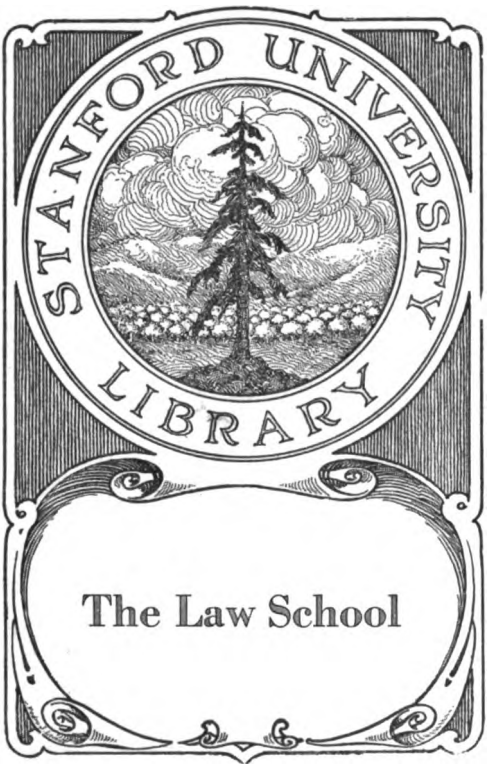

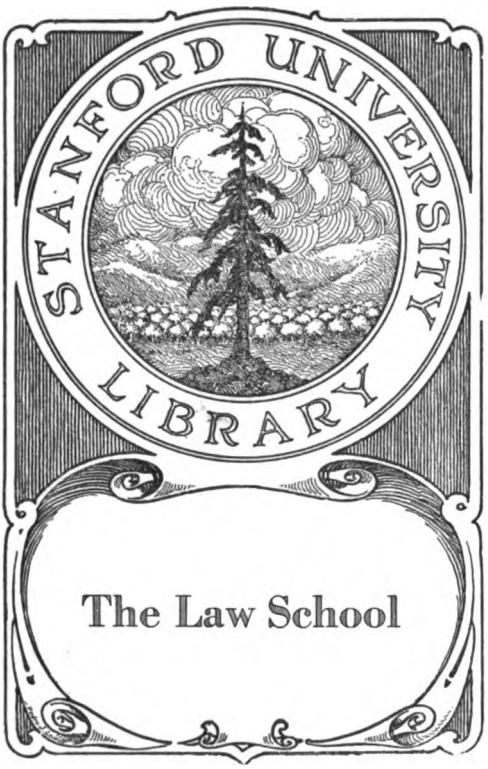

The Law School

THE

VICTORIAN LAW REPORTS.

UNDER THE SUPERINTENDENCE AND CONTROL OF THE COUNCIL OF LAW REPORTING IN VICTORIA.

Supreme Court of Victoria.

CASES DETERMINED IN THE

SUPREME COURT OF VICTORIA

AND

IN CHAMBERS.

EDITOR—JOHN BURNETT BOX, *Barrister-at-Law.*

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1893.

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IN VICTORIA.

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Vacant.

ERRATA.

Page	*Line*	*For*	*Read*
16	6 from bottom	"*Companies*"	"*Stamps.*"
246	bottom line	"10 V.L.R. Eq. 48"	"9 V.L.R. Eq. 28."
282	16 from bottom	"of a"	"to a."
318	12 from bottom	"every"	"any."
496	8 from bottom	"notice"	"value."
543	5 from bottom	"the defendant"	"James."
564	11 from top	"Daniel"	"Donald."
592	15 from top	"anywhere"	"here."
698	2 from bottom	in notes, *for* "3 W.W. & A'B. (L.) 7"	*read* "5 W.W. & A B. (L.) 7."

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

C.

F.

G.

H.

M.

N.

S.

T.

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W.

Y.

Z.

CASES

DETERMINED BY THE

SUPREME COURT OF VICTORIA

AND IN CHAMBERS.

55 & 56 VICTORIÆ.

[IN CHAMBERS.]

IN THE WILL OF DIXSON.

1892
Feb. 26.

Hood, J.

Administration and Probate Act 1890 (*No.* 1060), *s.* 23—*Application for a jury.*

In an application under sec. 23 of the *Administration and Probate Act* 1890, it lies on the applicant to show that there is a question of fact fit to be tried by a jury.

The mere fact that a caveat has been lodged, or that the testamentary capacity of a testator will be in dispute, does not constitute a fit cause that that question of fact should be tried by a jury.

Semble, that the provisions of sec. 23 are intended for the assistance of a judge, and that it is for a judge at the trial to order a jury if he shall think fit.

APPLICATION by the caveators, under sec. 23 of the *Administration and Probate Act* 1890, that the question of fact, whether the testator was of sound testamentary capacity at the time of the execution of his will, should be tried by a judge sitting with a jury.

Coldham in support for the caveators.

Topp for the executors to oppose—No question of fact has yet arisen. This question can only arise at the trial, and then it is for the judge, if he think fit, to decide that the question of fact be tried by a jury.

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In re DIXON.

Hood, J.

HOOD, J. I think there are two reasons for refusing this application. In the first place, sec. 23 provides that the Court may, if it shall think fit, cause the question of fact to be tried by a jury. It lies on the applicant to show that there is a question of fact fit to be tried by a jury. In the present case the applicants merely say that a caveat has been lodged, and that the testamentary capacity of the testator will be in dispute, and that, therefore, this is a fit case to be tried by a jury. If that contention be correct, then in every case where a will is attacked on the ground of mental incapacity, the matter must go to a jury if either party asks for it. I do not think that the mere assertion that the mental capacity of the testator will be in dispute necessarily constitutes a reason why that question of fact should be tried by a jury. I therefore refuse the application.

In the second place, although it is not necessary for my decision, I think that an examination of the arrangement of the secs. 20 to 23 of the Act inclusive, bears out the argument of Mr. Topp, namely, that the provisions of sec. 23 are intended for the assistance of the judge at the trial in case he should desire the assistance of a jury to try any question of fact. Sec. 20 deals with the service of the order *nisi*; sec. 21 provides that if the caveator does not appear on the return day, the order *nisi* may be made absolute on an affidavit of service. Sec. 22 provides that on the hearing the parties may verify their respective cases by affidavit. Then sec. 23 provides that where a question of fact arises in any proceeding, the *Court* may cause the same to be tried by a jury. From this, I think it is evident that it is for a judge at the trial to order a jury if he think fit. Although I think that this is the correct interpretation of these sections, I must not be taken as deciding the present case upon that interpretation.

Proctors for the caveators: *Moule & Seddon.*

Proctors for the executors: *Braham & Pirani.*

A. F. M.

[IN CHAMBERS.]

1892
Feb. 4.

Hood, J.

CALDWELL *v.* DONALDSON.

Defamation—"Rules of the Supreme Court 1884"—*Order XXII., r.* 1—*Action of slander—Denial of liability—Payment of money into court—Order XXXVI., r.* 37—*Particulars of evidence in mitigation of damages.*

In an action of slander, where the innuendo alleged by the plaintiff places the meaning upon the words complained of beyond the natural meaning of such words, the defendant, in his defence, may deny the innuendo and admit the slander, and pay money into court in respect of such slander.

Particulars given by a defendant, under Order XXXVI., r. 37, in an action of slander, should not be filed as part of the pleadings.

THIS was an application by summons on behalf of the plaintiff for an order that the defence and particulars thereunder be amended or struck out, on the grounds that the same tend to embarrass the fair trial of the action, and that the same are not in compliance with the *Rules of the Supreme Court*, Order XXII., r. 1. The statement of claim was in the following form:—1. The plaintiff is a stock and share broker, carrying on business in Melbourne. 2. On the 22nd October 1891 the defendant falsely and maliciously spoke and published of the plaintiff, in his business as a stock and share broker, the words following: "I'll stop you issuing valueless cheques; I'll bring a policeman, and have you arrested for this;" and also (addressing certain bystanders and displaying a cheque), "Look here, he robbed me of this money; here is his dishonoured cheque," meaning by the said words that the plaintiff had been guilty of fraudulent and dishonest practices in his business as a stock and share broker, and also that the plaintiff had been guilty of the indictable offence of obtaining money from him (the defendant) by false pretences, and was liable to arrest, imprisonment, and punishment for the same.

The defence was as follows:—1. That defendant denies that he meant by the words complained of the meanings, or any of the meanings, alleged in the innuendoes contained in the statement of claim. 2. As to the words complained of, without the alleged meanings, the defendant brings 10*l.* into court, and says that the same is sufficient to satisfy the plaintiff's claim.

With this defence, and on the same piece of paper, particulars were delivered pursuant to Order XXXVI., r. 37.

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Fink in support of the summons—The defence is a denial of liability, and the defendant is not allowed, with such a defence in an action for slander, to pay money into court. It is against the express provisions of Order XXII., r. 1. If the words have only one meaning, the innuendo is surplusage, and if the defendant had objected thereto he should have moved to have them struck out.

Counsel referred to *Fleming* v. *Dollar* (*a*).

Isaacs to oppose—The fact that the innuendo is put in shows that the words do not naturally bear the meaning sought to be placed upon them. The defence admits the speaking of the words without the alleged meaning, and pays 10*l.* into Court; that does not amount to a denial of liability. The particulars annexed under Order XXXVI., r. 37, are not part of the pleadings, and were never intended to be so.

HOOD, J. With regard to the particulars delivered, I have no doubt at all that they are not part of the pleading; it is merely a notice which has to be given by the defendant in order to enable him to give certain evidence at the trial. As to the other point, I was a little troubled as to whether the innuendo does not set out the only possible meaning the words could bear, but I think now that the innuendo does carry them beyond the natural meaning. There is no defence to the slander. The defendant admits the slander, and pays 10*l.* as satisfaction, but says that the words do not bear the slanderous meaning which the plaintiff seeks to put upon them. The plaintiff should be careful not to file the notice of particulars as part of the pleadings. I dismiss the summons, with 3*l.* 3*s.* costs, and certify for counsel.

Summons dismissed.

Solicitors for plaintiff: *Fink, Best, & P. D. Phillips.*
Solicitor for defendant: *J. A. Isaacs.*

W. H. M.

(*a*) 23 Q.B.D. 388.

[IN CHAMBERS.]

1892
Feb. 1, 4.

Holroyd, J.

ANDERSON *v.* DOUGLAS & COMPANY.

Interrogatories—Objection to answer on ground that answers tend to criminate—Editor of newspaper.

A judge must decide, when objection is taken to answer an interrogatory on the ground that it may tend to incriminate the person answering, whether in his opinion the question may have such a tendency.

Roper v. *Williams* (6 A.L.T. 65) followed.

APPLICATION on behalf of the plaintiff for an order that the defendants do deliver further and better answers to certain interrogatories.

The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiff was, at all times necessary for this action, a resident of, and an alderman of, the town of Geelong, and as such alderman was, and was known generally to be, a candidate at a then shortly ensuing election for the office of mayor of the said town, and but one other alderman besides the plaintiff was a candidate for the said office at the said election therefor.

2. The defendants, at all times necessary for the purposes of this action, were the proprietors and publishers of a certain newspaper, circulating at Geelong aforesaid, called and known as the *Geelong Advertiser*.

3. The defendants falsely and maliciously printed and published in the said newspaper of and concerning the plaintiff, and of and concerning him as such alderman, and of and concerning him as such candidate as aforesaid, the following scandalous words:—"Time was when a Manners-Sutton or a Normanby satisfied the ambition of the *elite* of colonial society. That is no longer the case, and in municipal matters we ought not to be satisfied with a class of men as mayors who are utterly unable to realise the duties which attach to so honourable and responsible a position" (meaning to indicate as a person of that class the plaintiff). "A man, for example, who is sober only by accident" (thereby meaning the plaintiff), "and who is so amorously inclined that he cannot enter a manufactory where women are employed without embracing the most buxom of them is scarcely the creature" (meaning thereby the plaintiff) "that we should select to preside over our municipal affairs. . . . . We therefore utter in time a word of warning, not to the burgesses, who unfortunately have no voice in the selection, but to the town council" (meaning the town council of the said town of Geelong, which possessed the right of electing the mayor of the said town), "who will be held seriously responsible for what they do at the forthcoming mayoral election."

4. The defendants meant, and intended to, and did convey by the said words that the plaintiff was an individual so destitute of intelligence and personal dignity, and of the ordinary sense of duty and responsibility to or in a public office, that he was wholly unfit to be appointed to, or entrusted with, the office of mayor of Geelong, and if he were entrusted therewith he would degrade and discredit it. And the said defendants also meant, and intended to, and did convey by the said words that the

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ANDERSON v. DOUGLAS & Co.

Holroyd, J.

plaintiff was a person of so habitually drunken habits that it was only by some accident which restrained the plaintiff from access to intoxicating liquors that he was ever sober; and further, that the plaintiff was a person who had so little reasonable and proper control over his amorous propensities that, on entering a place of business where women were employed, the plaintiff, destitute of all sense of dignity and propriety, either in himself or towards the said women, was accustomed to seize on and embrace such of them as he chanced to fancy; and further, that by reason of the said misconduct the plaintiff could not accurately or appropriately be described as a man, but was a creature practically of a lower order than mankind, and an individual wholly unworthy of, and impossible to be elected to, the office of mayor of Geelong.

5. By reason of the premises, the plaintiff was greatly injured in his credit and reputation, and was also greatly injured in his credit and reputation as such alderman of the said town council of Geelong, and by reason of the nearness of the said election to the said publication was disabled from disabusing the minds of the councillors and aldermen of the said town council of the town of Geelong of the said charges before the said election, and was therefore compelled to, and did in fact, withdraw his candidature for the said office.

6. The defendants also falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him as such alderman as aforesaid, the following scandalous words:—"If we tell the burgesses that their money has sometimes been voted away by a man" (meaning the plaintiff) "so drunk that he" (meaning the plaintiff) "could not possibly have known what he" (meaning the plaintiff) "was doing, it may possibly induce them to ponder over the statements of the chairman of the finance committee of the council, and ask for an explanation of them."

7. The defendants meant, and intended to, and did in fact, convey by the said words that the plaintiff, in total disregard of his duty as and being, as the fact was, the chairman of the public works committee of the council of the said town of Geelong, or as and being an alderman of the said council, used to come at times to the discharge of his duties, as such chairman or as such alderman, in such a condition of drunkenness as to be quite incapable of duly performing the said duties of his said office or offices; and that notwithstanding, and reckless of that fact, the plaintiff on such occasions, as such chairman or as such alderman, voted away the public funds of the said town of Geelong, to the great detriment and disadvantage of the said town, and that in view of the said matters the conduct and statements of the plaintiff as such chairman, or as such alderman, deserved and demanded a close, and, to him, discreditable investigation.

9. The defendants also on the 13th day of March 1891, falsely and maliciously printed and published of the plaintiff, and of him as such alderman of the said town of Geelong, the following scandalous words:—"Members of the council" (meaning the town council of the town of Geelong) "affect a happy unconsciousness of having any black sheep in the fold, and they innocently ask us to enlighten them further on the subject . . . . We will give them all that they ask for, with possibly something added, but in doing so we shall expect to be indemnified against any action that may be taken upon it. If the council" (meaning the said council) "is then in a position to prove that we made a false allegation, we will make the fullest possible amends. We think, however, that when they" (meaning the said council) "have taken counsel with each other they will conclude that to give the indemnity we ask for would be a risky proceeding, and that they" (meaning the council) "had better seek out their black sheep, whitewash him, and for the credit of the council" (meaning the said council) "generally put him upon his good behaviour."

10. The defendants intended by the said words to convey that the plaintiff was the black sheep of the said council, and that by his misconduct and evil habits he stood in exceptional contrast to the rest of the said council, and was a discredit and disgrace to it.

To this the defendants pleaded they did not admit the allegations in paragraphs 1, 3, 4, 5, 6, 7, 9, and 10 of the statement of claim, and, if they printed the words complained of in paragraphs 3, 6, and 9, which they do not admit, that such words, without the alleged meanings, were true in substance and fact.

The interrogatories, the answers to which were under review, were as follows:—

2. Was not an election for the office of mayor of the town of Geelong appointed to be holden on the 9th October 1890, or otherwise?

3. Was not the plaintiff as such alderman as aforesaid, or how otherwise known to, or believed by, the defendants, or by their editor Reuben Quarrell, and by the burgesses of Geelong, to be a candidate at such election for such office of mayor?

4. Look upon the three several prints exhibited to you herewith, and marked respectively A, B, and C, and answer were not each and every of such prints printed and published by you, the defendants, or for and on behalf of you, the defendants, as the proprietors and publishers of the newspaper called and known as the *Geelong Advertiser*, and are not the said prints part of the issues of the said newspaper printed and published by or for the defendants on the 7th October 1890, the 5th March 1891, and the 13th March 1891, respectively? If nay, how otherwise?

5. Were not the words [here followed the first alleged libel, as set out in paragraph 3 of the statement of claim] which appeared in the print of the *Geelong Advertiser* of the 7th October 1890, and exhibited to the defendants herewith, and marked A, or some of such words, and, if so, which, intended by you, or your agents or contributors, to refer to the plaintiff, and to the plaintiff as an alderman of the town of Geelong, and to the plaintiff as such candidate at the election for the office of mayor of the town of Geelong?

6. If the words quoted in interrogatory 5, or some of them, were not intended to apply to the plaintiff as in the said interrogatory 5 inquired of them, to whom were such words intended to refer?

7. If the said words set out in interrogatory 5, and printed and published in the said *Geelong Advertiser* of the 7th October 1890, and exhibited to the defendants herewith, and marked A, or some of them, were intended to refer to the plaintiff, then set forth the occasions and the places, or the principal of them, on which it is by the said words alleged the plaintiff was drunk, so as to warrant the conclusion that "he was sober only by accident." Also set forth the name and locality of the manufactory in the said words referred to, so as to identify it.

8. Do not the words set forth in the said 5th interrogatary mean, and were they not intended to mean substantially what is alleged in paragraph 4 of the statement of claim? If nay, what do the said words mean, or what were they intended to mean?

9. Did not the plaintiff in fact withdraw his candidature for the office of mayor of Geelong, at the election to have been holden for such office on the 9th October 1890, after the publication of the *Geelong Advertiser* on the 7th October 1890, and

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before the holding of the said election, and are not the defendants, or is not their agent Reuben Quarrell, aware that the plaintiff so withdrew his candidature by reason of the probable injurious effect on such candidature by reason of the publication of the words complained of in paragraph 3 of the statement of claim in the said *Geelong Advertiser* of the 7th October 1890? If nay, state how otherwise he withdrew such candidature.

10. Have the defendants or their editor, the said Reuben Quarrell, or their agents, ever seen or known the plaintiff to be or to have been drunk? If yea, when and where, and on what occasion or occasions?

11. Have the defendants or their editor, the said Reuben Quarrell, or their agents, ever seen or known the plaintiff embrace, or to have embraced, any female employed at any manufactory? If yea, who was such female, and at what manufactory was she employed, and where did such embracing take place?

12. Were not the words:—"If we tell the burgesses that their money has sometimes been voted away by a man so drunk that he could not possibly have known what he was doing," set forth in the *Geelong Advertiser* of the 5th March 1891, exhibited herewith and marked B, intended to refer to the plaintiff? If nay, to whom were the said words intended to refer?

13. If the said words referred to in interrogatory 12 were intended to refer to the plaintiff, then state the occasions where and when the plaintiff was drunk as in the said words alleged.

14. Were not the said words set out in interrogatory 12 intended to bear, and do they not bear, the meaning assigned to them by paragraph 7 of the statement of claim herein? If nay, how otherwise?

15. Look at the words set forth in quotation in paragraph 9 of the statement of claim herein, and also appearing in the *Geelong Advertiser* of the 13th March 1891, exhibited to you herewith and marked C. Were not the said words intended to indicate and refer to the plaintiff as "the black sheep" therein referred to? If nay, what other person was intended to be indicated or referred to thereby?

16. Do not the said words referred to in interrogatory 15 mean, and were they not intended to mean, substantially what they are alleged to mean by paragraph 10 of the statement of claim herein? If nay, then what other meaning do they bear, or were they intended to bear?

17. Were not the words complained of and set forth in paragraphs 3, 6, and 9 of the statement of claim respectively, and appearing in the *Geelong Advertiser* of the 7th October, 1890, the 5th March 1891, and the 13th March 1891 respectively, exhibited herewith and marked respectively A, B, and C, written by the said Reuben Quarrell as, and being, the editor of the said newspaper, the *Geelong Advertiser*? If nay, by whom were the said words written?

The answers to the above interrogatories were as follows:—

2. As to the 2nd interrogatory, we believe that the 9th day of October is the day appointed for the election of the mayor of the town of Geelong.

3. As to the 3rd interrogatory, we say that we are unable to say, of our own knowledge, information, and belief, whether the plaintiff was a candidate for the office of mayor, and we decline to answer further the said interrogatory.

4. As to the 4th, 5th, 7th, 12th, 13th, and 15th interrogatories, we decline to answer the same, on the ground that the answers thereto might tend to criminate us.

5. As to the 6th, 8th, 14th, and 16th interrogatories, we decline to answer the same, on the grounds that they are irrelevant, and that our answers thereto might tend to criminate us.

6. As to the 9th interrogatory, we are unable to answer the same, as to our knowledge, information, and belief, as we were not aware that the plaintiff was a candidate for the position of mayor, and we decline further to answer the said interrogatory, on the ground that it is fishing and irrelevant.

7. As to the 10th interrogatory, we say that Frederick Montague Douglas saw and knew the plaintiff to be drunk on the 11th December 1889, and we have seen and known the plaintiff to have been drunk on divers occasions, in Geelong and elsewhere, during the years 1889, 1890, and 1891, and we are unable more closely to fix the said occasions, and we decline further to answer the said interrogatory, on the ground that it is fishing and irrelevant.

8. As to the 11th interrogatory, none of the defendants have ever seen or known the plaintiff to embrace, or to have embraced, any female employed in any manufactory.

9. As to the 17th interrogatory, we decline to answer the same, on the ground that it is irrelevant.

Dr. *Madden* in support—In an action for slander, the plaintiff may administer interrogatories asking the defendant whether he uttered the words complained of, and whether they, or the substance of them, had been communicated by a third person: *Daily Telegraph Newspaper Company Limited* v. *Berry* (*a*); and therefore he may be asked whether the words refer to the plaintiff. A defendant may claim that an admission might tend to criminate him: *Smith* v. *Powell* (*b*); but the Court has to be satisfied that the answer might have that result: *Roper* v. *Williams* (*c*). Quarrell is the agent or servant of the defendants, and therefore they would be liable if he wrote the words complained of; and, as their servant or agent, they are bound to obtain from him the information sought: *McMeckan* v. *Aitken* (*d*).

Counsel referred to the *Annual Practice* 1892, p. 564.

Coldham to oppose—Every person who published a libel is liable to be prosecuted criminally, and therefore he can claim privilege. When an objection is taken on oath that the answer might tend to criminate the person interrogated, and there is no evidence to the contrary, the judge is bound to assume that the objection is *bonâ fide*.

Reference was made to *Odgers on Libel* (2nd ed.), p. 517.

Cur. adv. vult.

(*a*) 5 V.L.R. (L.) 343.
(*b*) 10 V.L.R. (L.) 79.
(*c*) 6 A.L.T. 65.
(*d*) 13 A.L.T. 33.

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HOLROYD, J. I shall order that the defendants do deliver to the plaintiff, within four days, further and better answers to the 2nd and 3rd interrogatories, excepting so much of the 3rd interrogatory as relates to the burgesses of Geelong. I think the answer to the 4th interrogatory might tend to criminate the defendants. The 5th interrogatory is so framed as to imply an admission of publication, and the answer might also tend to criminate the defendants. The same observations apply to the answers to the 7th, 8th, 12th, 13th, 14th, 15th, and 16th interrogatories. The 6th interrogatory is irrelevant, and an answer might tend to criminate the defendants. The 9th, 10th, and 11th interrogatories have, in my opinion, been sufficiently answered, and the information sought by the 10th interrogatory as to the time, place, and occasions, may be obtained in another way. I do not think that an interrogatory can fairly be put as to how far the editors of a paper, or their agents, can support a charge of drunkenness, assuming that charge to refer to the plaintiff; and the same observation applies to the 11th interrogatory with respect to the charge of embracing females. The plaintiff, in my opinion, is not entitled to demand, as he has done by the 17th interrogatory, by whom the articles were written. I may add that I adhere to what I said in the case of *Roper* v. *Williams*, namely, that the judge must, when an objection is taken to answer an interrogatory on the ground that it may tend to criminate the person interrogated, decide whether, in his opinion, the question may have such a tendency. That is in accordance with the case of *Lamb* v. *Munster* (*e*), and there is nothing inconsistent with it in the opinion expressed by the Chief Justice in the case of *Smith* v. *Powell* (*f*). The defendants to have four days to answer further, as directed. Costs in the cause. I certify for counsel.

Solicitors for plaintiff: *Davies, Campbell & Davies.*
Solicitors for defendant: *Davies, Price & Wighton.*

[*Reported by J. C. Anderson, Esq., Barrister-at-Law.*]

(*e*) 10 Q.B.D. 475.

(*f*) 10 V.L.R. (L.) 79.

[IN CHAMBERS.]

1891
Dec. 18.
1892
Feb. 8.

A'Beckett, J.

HUMBERSTONE AND ANOTHER *v.* MINCHIN.

Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6—*Specially endorsed writ—Order XIV., r.* 1—*Application for final judgment—Promissory note—Claim for interest—Instruments Act* 1890 (*No.* 1103), *s.* 58.

A writ may be specially endorsed in an action on a promissory note, with a claim for interest.

APPLICATION by way of summons on behalf of the plaintiffs for leave to sign final judgment under Order XIV., r. 1. The writ was endorsed in the following form:—

STATEMENT OF CLAIM.

The plaintiffs' claim is against the defendant as maker of a promissory note for 36*l.* 10*s.* 6*d.*, dated the 5th day of March 1890, payable six months after date, in favour of the plaintiffs; and as maker of a promissory note for 64*l.* 11*s.* 6*d.*, dated the 15th day of August 1890, payable three months after date, in favour of the plaintiffs, and of which two promissory notes the plaintiffs are the holders. Particulars:—

Principal sum due on first-mentioned promissory note			36*l.*	10*s.* 6*d.*
Principal sum due on second promissory note			64*l.*	11*s.* 6*d.*
			101*l.*	1*s.* 0*d.*
1891—January 15th, paid	40*l.*	3*s.* 6*d.*		
„ —May 2nd, paid	4*l.*	4*s.* 4*d.*		
			44*l.*	7*s.* 10*d.*
			56*l.*	13*s.* 2*d.*
Interest			6*l.*	1*s.* 7*d.*
Amount due			62*l.*	14*s.* 9*d.*

The writ concluded in the form set out in the judgment.

Piggott in support of the summons.

Anderson to oppose—There is a preliminary objection to this application, namely, that the writ is not specially endorsed. The interest claimed is not the subject of a specially endorsed writ. The interest claimed is in the nature of damages, and according to the decision of Hood, J., in *Coane* v. *Thomas Bent Land Co.* (*a*). In *Rodney* v. *Lucas* (*b*) it was decided that in all cases, except in

(*a*) 17 V.L.R. 198. (*b*) 10 Ex. 667.

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cases on bills of exchange and promissory notes, if a plaintiff by his endorsement claimed interest where it was not on a contract, express or implied, and signed judgment thereon in default of appearance, such judgment would be set aside. The interest was allowed to be claimed on bills of exchange and promissory notes, because it was the practice of the Court, but that practice is not in force here. In the case of *Webster* v. *British Empire Mutual Life Assurance Co.* (*c*), Cotton, L.J., at pp. 175, 176, lays it down that interest on a promissory note is in the nature of damages, and it is for the jury to assess the amount. By sec. 58 of the *Instruments Act* 1890 it is provided that interest may be allowed as liquidated damages, but may be withheld wholly or in part. If interest may be withheld, and if it is in the discretion of the jury to assess the rate to be allowed, then such interest is in the nature of damages, and cannot be the subject matter of a specially endorsed writ.

Piggott in support of the summons—It is provided by sec. 207 of the *Instruments Act* 1890 that interest on bills of exchange and promissory notes is to be at the rate of 8 per cent., unless otherwise agreed upon, and sec. 58 allows interest as liquidated damages. The rate of interest being thus ascertained, and being allowed as liquidated damages, such interest is clearly within the provisions of Order III., r. 6. Interest is included in the forms given in Appendix C., sec. iv., of the *Rules of the Supreme Court.*

Counsel referred to *Exparte Charman* (*d*); *Chalmers on Bills of Exchange* (4th ed.), p. 191; *Annual Practice* 1890-1891, p. 203.

Cur. adv. vult.

A'BECKETT, J. An application for summary judgment under Order XIV. in an action on promissory notes. It is objected that the writ cannot be regarded as specially endorsed, because it concludes, "The plaintiffs also claim interest on 56*l.* 14*s.* 2*d.*, being the balance due on the said promissory notes, at the rate of 8 per centum per annum from the date hereof to the day of signing judgment, by virtue of the provisions of the *Instruments Act* 1890, by virtue of which also the interest above stated is claimed." It appears that a claim of this character is usual, and does not deprive

(*c*) 15 Ch. D. 196. (*d*) W.N., 1887, p. 184.

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the claimant of the benefits of special endorsement, and following what I believe to be the practice on this subject I treat this writ as specially endorsed. An affidavit in answer makes out a case for counterclaim to some extent connected with the claim sued on. I order judgment to be entered for the amount of the claim, and costs, but execution not to issue until counterclaim has been disposed of. I give the plaintiff 3*l.* 3*s.*, costs of the summons; defendant to abide his own costs. Certify.

Solicitors for plaintiffs: *Smith, Emmerton & Johnson.*

Solicitors for defendant: *Turner & Ham.*

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Feb. 11.

Local Government Act **1890 (*No.* 1112), *s.* 51—*Shires Statute* (*No.* 358), *s.* 45—"*Local Government Act* 1874" (*No.* 506), *s.* 54—*Councillor concerned in profit in contract with council—Rule nisi to oust such councillor.***

In the *Shires Statute* (No. 358), sec. 45, provides—"No person who shall hold any office or place of profit under, or in the gift of, the council of any shire, or be concerned or participate in anywise in any contract with such council, or in the profit thereof, or of any work to be done under the authority of such council, shall be capable of being or continuing a councillor of the shire."

The "*Local Government Act* 1874" (No. 506), sec. 54 (re-enacted in sec. 51 of the *Local Government Act* 1890) provides—"No person holding any office or place of profit under, or in the gift of, the council of any municipality, or concerned or participating in the profit in or of any contract with any municipality, or in or of any work to be done under the authority of any such council, shall be capable of being or continuing a councillor of the municipality."

Held, that in the alteration of the former by the latter section, the Legislature intended instead of casting incapacity upon persons who were either concerned or participated in a contract, or in the profits of any contract, to limit the incapacity to interest in the profits.

The defendant councillor was a member of a syndicate which owned a quarry. With this syndicate, and to the defendant's knowledge, a shire contractor made a contract to obtain stone from them at a certain price. The contractor sold some of this stone to the council in accordance with contracts with the council, the acceptance of which contracts the defendant had proposed.

Held, that the defendant, who proposed the acceptance of these contracts, was not concerned, and did not participate, in the profit; and a decision discharging a rule *nisi* to oust the defendant upheld.

APPEAL from judgment.

The defendant, while a member of the municipal council of Berwick was also a member of a syndicate which owned a certain

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quarry in the county of Mornington. From this quarry a shire contractor, Mr. James O'Donnell, with the defendant's knowledge, obtained stone at a fixed price, some of which stone this contractor afterwards supplied under contracts to the shire council, some of which contracts the defendant had himself proposed. Beyond this the defendant was not in any way interested in O'Donnell's contracts, or in any profit he might make out of them. Under these circumstances, Mr. Sidney Webb, a ratepayer, took out a rule *nisi* to oust the defendant from his office, which was argued before Mr. Justice Hood in November 1890, and after hearing arguments His Honor discharged the rule with costs. Against this decision the relator appealed to the Full Court.

Madden (with him *Isaacs*) for the appellant, the applicant below—The learned primary judge was in error in holding that it was participation in the profits of a contract which ruled this matter; the section is still aimed at a councillor who is concerned or participates in any contract. The section should be read thus: "No person being concerned or participating in the profits in or of any contract with any municipality, or no person concerned or participating in or of any contract," shall be capable of being a councillor.

[HIGINBOTHAM, C.J. We are against you on that interpretation of the section.]

Counsel cited *Nutton* v. *Wilson* (*a*); *In re Heather, exparte Kilpatrick* (*b*); *Towsey* v. *White* (*c*); *Nicholson* v. *Fields* (*d*).

Topp and *Bryant* for the respondent were not called on.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HODGES, JJ.]. The question raised in this appeal turns on the construction, in the first instance, of sec. 51 of the *Local Government Act* 1890. This section appears in an altered form from that appearing in a previous Statute—the "*Shires Statute* 1869," sec. 45. The provisions of that section were—

"No person who shall hold any office or place of profit under or in the gift of the council of any shire, or be concerned or participate in any wise in any contract with

(*a*) 22 Q.B.D. 744.
(*b*) 16 V.L.R. 460.
(*c*) 5 B. & C. 125.
(*d*) 31 L.J. (N.S.) Exch. 233.

such council or in the profit thereof, or of any work to be done under the authority of such council shall be capable of being or continuing a councillor of the shire."

The words used in the amended Statute in sec. 54 of the "*Local Government Act* 1874" are different. That section is—

"No person holding any office or place of profit under or in the gift of the council of any municipality, or being concerned or participating in the profit in or of any contract with any municipality, or in or of any work to be done under the authority of any such council, shall be capable of being or continuing a councillor of the municipality."

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Now, it may fairly be inferred that where the Legislature introduces a similar provision with an alteration, that altered form is intended to have an altered effect, and we think that the construction which has been placed upon this section by Hood, J., points out the nature of the alteration which the Legislature intended, viz., instead of casting this incapacity upon persons who were either concerned or participated in or in the profits of any contract, it was intended to limit the incapacity to interest in the profits. It has been argued by Dr. Madden that the words are to be read "concerned or participating in or of any contract," omitting the words "the profit," and then repeat the words "concerned or participating in the profits." We do not think that the order of the words in the section admits of such a disturbance. The words, taken in their natural order, point to the intention of the Legislature as meaning that a councillor should be incapable of being concerned or participating in the profits.

Then it is contended that, if such be the meaning of the section, the evidence shows that the respondent councillor was concerned or participated in the profits in certain contracts, but we do not think that the evidence supports that contention. It appears that this syndicate made an agreement with a contractor named O'Donnell for the supply of stones to him at a fixed rate of sixpence per cubic yard, and by the terms of his contract he was at liberty to sell the stones to whom he liked, and to deal with them as he pleased, and he sold some to the council, and he also sold some to other persons, but whatever he did with them he was under an obligation to the syndicate to pay them the price agreed upon. Then O'Donnell makes certain contracts with the council of Berwick for a supply of stones to them, and for whatever stones he supplies to them he is

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entitled to be paid for by them. He may or may not make a profit out of these contracts; that has nothing to do with the price he is to pay the syndicate. The profits which he may or may not make in carrying out these contracts are something entirely distinct from the price which he is to pay to the syndicate; they were entitled to be paid by him, whether he is paid by the council or not; and we do not think that under the circumstances disclosed by the affidavits it is shown that the councillor who, in some instances, proposed the acceptance of certain of these contracts was concerned or participated in any way in the profits. We, therefore, think that the decision of the learned judge below is correct, and that the appeal has failed, and must be dismissed, with costs.

Solicitors for relator: *Crisp, Lewis & Hedderwick.*
Solicitor for respondent: *Herald.*

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BANK OF SOUTH AUSTRALIA *v.* CITY & COUNTY PROPERTY BANK.

Stamps Act 1890 (*No.* 1140), *s.* 77, *sub-sec.* 1; *sec.* 87, *sub-sec.* 4—*Companies Act* 1890 (*No.* 1074), *s.* 48—*Promissory note made by company*—"*Duly stamped.*"

Plaintiffs were the endorsees and holders of a promissory note, dated the 1st of August 1888, of which the defendants were the makers. The note was made by three of its directors, for and on behalf of the defendant company. The primary judge found as facts that the stamp appearing on the note was affixed some time before the signatures of the three directors were attached to it. The signatures were all completed before the 1st of September 1888. The stamp had been cancelled by the name of the defendant company being impressed across it, and the date, 1st September, written on.

Held, that this note being executed by the directors in conformity with the powers given by sec. 48 of the *Companies Act* 1890, was one executed, not by three persons, but by one person, viz., the company, and that the proper time for affixing the stamp was some time before, or at the time when the signatures of the three directors had been completed.

Held, that the plaintiffs, having proved that the stamp was affixed at the proper time, and that it was affixed by the authority of the proper person (the company), were entitled to assume the 1st of September as the true date of cancellation, and had brought themselves within the second alternative of sec. 77, sub-sec. 1, of the *Companies Act* 1890, which provides: "An instrument, the duty on which is permitted or required by law to be denoted either wholly or partly by an adhesive stamp is not to be deemed duly so stamped with an adhesive stamp unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials of his firm together with the true date of his so writing so that the stamp may be effectually cancelled and rendered incapable of

being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time."

Held, also, that the plaintiffs were protected by and entitled to sue on the note by the provisions of sec. 87, sub-sec. 4, of the *Stamps Act* 1890, which provides: "That if at the time when any . . . . promissory note comes into the hands of any *bonâ fide* holder thereof there shall be affixed thereto a proper adhesive stamp, or stamps of sufficient amount effectually obliterated and purporting and appearing to be duly cancelled such promissory note shall so far as relates to such holder, be deemed to be duly stamped."

Goldberg v. *Devlin* (12 V.L.R. 795), approved of.

APPEAL from judgment.

The facts appear in the headnote and the judgments.

The Solicitor for the defendant for the appellants.

Higgins and *Mitchell* (with them *Purves*, Q.C.) for the plaintiff respondents.

The following authorities were referred to:—*Goldberg* v. *Devlin* (*a*); *Camp* v. *King* (*b*); *Bagley Brothers & Co. v. Ellison* (*c*); *Viale* v. *Mitchell* (*d*).

HIGINBOTHAM, C.J. In this case we are all of opinion that the appellant has failed. It is an appeal from the judgment of Mr. Justice Hood giving judgment for the plaintiff upon a promissory note dated the 1st of August 1888, payable to the Preston Heights Estate Company for the sum of 19,516*l.* 8*s.* 6*d.* Various questions were raised at the hearing, but the single question argued before us is raised by the second clause of the defence, viz., that this promissory note was invalid in that it was not duly stamped or at all at the time of its being made. The learned judge was of opinion that all the grounds of the defence failed. We too are all of opinion that the defence has failed. I am of opinion that it has failed on both grounds, and owing, I think, to a mistake on the part of the defence, which lies at the foundation of the argument applied to both grounds, that mistake being that this was a promissory note which was executed by more than one person, and that therefore it became the duty of the person who

(*a*) 12 V.L.R. 795.
(*b*) 14 V.L.R. 22.
(*c*) 16 V.L.R. 263.
(*d*) 30 L.T. (N.S.) 463.

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first executed the document at the time he executed it then to cancel the stamp. Now, taking the first ground on which the plaintiffs rely, viz., under sec. 77 of the *Stamp Act* 1890, they claim to have brought themselves by proof within the second alternative of that section. Now, this section provides that—

"An instrument the duty upon which is required by law to be denoted either wholly or partly by an adhesive stamp shall not be deemed to be duly stamped unless the person required to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials or the name or initials of his firm together with the true date of so writing or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time."

Under this alternative it has been incumbent on the plaintiff to prove that the stamp appearing on this instrument was affixed at the proper time. Now, what is the proper time for affixing the stamp? In the hands of a holder that question is answered by the judgment in *Goldberg* v. *Devlin* (*e*), which says—

"Therefore under the second alternative, by reading secs. 46 and 47 together, it appears that the person who relies on the instrument, if he has taken and holds it when it does not present on its face a proper cancellation, is subject to the obligation of proving to the Court by other evidence that the stamp was affixed thereto at the proper time, and by or by the authority of the proper person."

Under this point it is assumed that this instrument does not or may not bear a proper cancellation upon the face of it. But what is the proper time for affixing the stamp on this instrument? That question is answered by this same case, which says—

"For there is no doubt that this affixing of the stamp may be before—even some time before—or at the time of signing the note."

That is the time of its execution. When was this note executed? It is executed when it is completely signed by all the necessary persons, and in a form to make it binding on the defendant company. The mistake which I think lies at the root of all the arguments is this, that they assume that this is a note which has been executed by three persons, and not a note executed by one person. It is a promissory note executed by a corporation under the trading companies' laws, and it is executed in conformity with the powers given by the *Companies Act* 1890, sec. 48, which provides—

"A promissory note shall be deemed to have been made on behalf of any company under this part of this Act if made in the name of the company by any person acting

(*e*) 12 V.L.R., at p. 799.

under the authority of the company, or if made by or on behalf of the company by any person acting under the authority of the company."

This note is signed by three of the directors of the defendant company for and on behalf of the City and County Property Bank, and the proper time for affixing the stamp to this instrument is, in my opinion, some time before or at the time when the signatures of the three directors have been completed. It is not a case in which the note is executed by more than one person; if it were, the time for cancelling the stamp on that note would be at the time when the note is so executed by the person first executing it. It is a note executed by a company (by persons duly authorised by that company), and it becomes an executed note only when it becomes executed by those persons so authorised so as to bind the company. What are the facts found by the learned judge, and which appear to be supported by a preponderance of the evidence? This stamp was affixed some time or other before the signatures of the three directors were attached to it. The precise time when all these signatures were completed is not clearly shown, but they were all completed some time before the 1st September (probably on the 28th or 29th of August), and on the 1st of September this obliteration appears to have been placed on this stamp, and on the same day, and after the obliteration, this document came into the possession of the plaintiffs. These facts the learned judge has found, and we think that the evidence clearly supports his finding, that this stamp was affixed at or before the time the note was executed, which is the proper time; and also that it was affixed by or by the authority of the proper person, viz., the corporation, and that proof having been given, the plaintiffs are entitled to rely upon the second alternative of sec. 77 of the *Stamp Act* 1890.

The learned judge has also held that the plaintiffs have supported their claim to sue on this instrument as a valid instrument, under sec. 87, sub-sec. 4, of the same Act, which provides that—

"If at the time when any bill of exchange or promissory note comes into the hands of any *bonâ fide* holder thereof there shall be affixed thereto a proper adhesive stamp or stamps of sufficient amount, effectually obliterated and purporting and appearing to be duly cancelled, such bill of exchange or promissory note shall, so far as relates to such holder, be deemed to be duly stamped."

The facts which I have shortly stated show that the plaintiffs have brought themselves within the protection of this fourth

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sub-section. It is not disputed that the plaintiffs are *bonâ fide* holders of this note; it is admitted that the stamp is of sufficient amount; it cannot be denied that it is effectually obliterated, and it purports and appears to be (according to the view taken by the learned judge) duly cancelled. Due cancellation consists in the person executing the note signing his name (which includes impressions of the nature here shown) upon the stamp, and the true date when such signature or initials of the person who cancels were placed thereon. Now there appears upon this stamp an impression of the name of the defendant company, and the true date upon which the the stamp has been cancelled. At all events the stamp purports and appears to be duly marked with the name of the defendant company, together with the true date of that marking. Of course the case would be entirely different if this note could be treated, as the appellants have treated it, as an instrument not executed by the defendant company, but as a note executed by three persons. The learned judge held that it would be a mistake to hold that this note was executed by any one of these persons. They signed as the agent of the corporation, they were its hand, and it was by means of their affixing their names that the corporation executed this instrument. These directors are not liable on that note. They are acting on behalf of the corporation. It does not bind the directors but the corporation; it is the only person bound by it, and it is the person to cancel the stamp. If the stamp is of the proper amount, if the proper name appears on it, and if the true date of writing such name appears on it or in the hands of a *bonâ fide* holder, if the stamp purports and appears to be duly cancelled, then there is a compliance with the provision imposed by this Statute. I am of opinion, therefore, that on both grounds the appeal has failed, and that the appeal must be dismissed with costs.

WILLIAMS, J. I am of opinion that the judgment appealed from should be supported on both grounds. It may be supported under sec. 87, sub-sec. 4, which is for the protection of *bonâ fide* holders, who are protected if the stamp on the face of it purports and appears to be duly cancelled. The stamp need not be duly cancelled; it is enough if it purports and appears to be duly cancelled.

That is so in this case. The manager of the plaintiff bank swears that when this note came into his possession it had upon it the stamp which is now attached to it, and that such stamp was in the same condition that it now is, and there was nothing to apprise him that that stamp was not duly cancelled in every respect. It was cancelled by the name of the party who made the note, the City and County Property Bank, and bore a date consistent with the note having been made by that party, and, therefore, upon the face of it, the plaintiffs are entitled to the protection of sec. 87, sub-sec. 4. I also desire to state that the plaintiffs come within the alternative of sec. 77, which provides:—

"An instrument, the duty upon which is permitted or required by law to be denoted either wholly or partly by an adhesive stamp, is not to be deemed duly so stamped with an adhesive stamp unless the person required by law to cancel"—

That is, the person by whom the note is executed—

"such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm"—

That was done in this case—

"together with the true date of his so writing"—

Now, that was not done in this case. It is beyond controversy that this note was executed by the defendant bank before the 1st of September, and it is equally beyond controversy that this cancellation did not take place before that date. But the section continues—

"unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time."

Now, I think, reading that section with the case of *Goldberg* v. *Devlin*, which is an express authority upon the law appertaining to that section, all that has to be proved is this—that the person who relies on the instrument (the plaintiff bank in this case), if he takes and holds a note which does not present on its face a proper cancellation, he is subjected to the onus of proving to the Court that the stamp was affixed at the proper time and by or by the authority of the proper person. The facts of this case present a weaker case against the plaintiff than the facts before the Court in *Goldberg* v. *Devlin*, because the stamp on this instrument does not present on its face an improper cancellation. It presents on its face a cancellation which may be a perfectly proper one, so far as the holders are

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concerned. The plaintiffs took this note on the 1st of September and discounted it, and when they took it it was in the same condition that it now is; that is sworn to by Mr. Eagar, the manager; therefore to his mind the note presented no irregularity; but in point of fact it turns out that the stamp was not duly cancelled. It was cancelled subsequently to the execution of it by the defendant bank, and therefore the onus is thrown on the plaintiffs to prove that the stamp was affixed at the proper time, that is to say, at the time when or before the instrument was executed. Now, there is ample evidence to satisfy the finding of the learned judge that this stamp was affixed to this note, either before or at the time of its execution, and that being so, the appeal is defeated on both grounds.

HOLROYD, J. I concur in the judgment of the Court. I was a member of the Court which decided the case of *Goldberg* v. *Devlin*, and I see no reason to depart from that judgment. To me the last clause of sub-sec. 1 of sec. 77 can bear but one meaning. The word "affixed" means simply put on or fastened to. The word is used in that sense in a number of other sections in the Act, and in no other sense. If it had been intended to put any other meaning upon it that would have been so expressed. The words "stamp appearing on the instrument" does not mean the stamp as it finally appears, but as it appears when it was affixed. Interpreting the clause according to the ordinary rules of grammar, it is only necessary to prove that the stamp was affixed at the proper time.

With reference to sub-sec. 4 of sec. 87, it appears to me that the argument addressed to us by the appellant would obliterate the maxim *qui facit per alium facit per se*. I do not think that the *Stamps Act* intended to touch that maxim at all. Now, what is the meaning of "the maker" of a note? It is used in two senses—in one sense where a person himself puts his hand to the document, and in another sense where an agent signs for him; but where an agent signs a promissory note for his principal the principal is liable at law, and therefore the principal is a person who may cancel the stamp, but I see no reason why the agent should not cancel the stamp for and on behalf of his principal, nor why the principal should not cancel the stamp himself. Under sec. 48 of the *Companies Act*, a promissory note shall be deemed to have been

made on behalf of a company if made in one of two ways—if made in the name of the company, or if it is made for or on behalf of and on account of the company by any person acting under the authority of the company. It appears to me that the stamp may be cancelled in precisely the same way. I see no reason why these directors should not have written their names across the stamps, stating that they wrote their names on behalf of the company; that would have been due cancellation, and writing the name of the company across the stamp equally amounted to due cancellation. There was authority to write it, and even if there had been no authority to write it, authority might have been presumed. The holder, when he took the note, had a right to assume that the stamp had been affixed and cancelled and to rely on the maxim *omnia præsumuntur rite esse acta*. I think therefore, that when this note came into the hands of the plaintiffs, by whom it was discounted, it purported and appeared to be duly cancelled, and accordingly the plaintiffs are protected under sec. 87, sub-sec. 4, as well as under the sub-sec. of sec. 77.

Solicitors for plaintiffs: *Attenborough, Nunn & Smith.*
Solicitor for defendants: *Hobday.*

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Feb. 22. 28.

PECK *v.* MAYOR, ETC., OF HAWTHORN.

Money paid under mistake of fact—Notice or demand.

The plaintiff and others, who were the owners of property adjoining a road, petitioned the defendants, a municipality, to take over, proclaim, and make the road; the defendants resolved, upon the consideration of the petition, to comply with the petition upon the petitioners paying half the costs of such work; the proportion of the plaintiff's share towards such expenses was made out and sent to him by the defendants, and he, under the belief that the defendants intended, and were willing to carry out the whole work, paying the other half of the expenses out of the municipal funds, sent a cheque for his share. The defendants received the contributions from the plaintiff and the other property holders, and expended the same in making the road as far as such contributions would go; they took over the road, and had it proclaimed, but, although several years had elapsed, they never completed the road, and never apportioned any of the municipal funds for that purpose. The plaintiff then brought an action for money had and received, to recover back his proportion of the contributions. No demand was made for the return of the money before action. The contract made with the defendants was one which the defendants, as a municipality, had no power to make.

Held, that as the money was paid under a mistake of fact, and as the defendants knew of the mistake, the plaintiff was entitled to maintain this action without any previous demand for payment.

APPEAL from judgment.

This was an appeal from the judgment of Hood, J., in an action brought by the plaintiff against the Mayor, etc., of the City of Hawthorn. The action, as originally framed, was for breach of contract in not taking over, proclaiming, and making the whole of a road in the defendant municipality as agreed. The defendants, in their defence, objected that the agreement sued upon was *ultra vires*, and could not be enforced, as it was not authorised by the provisions of the Local Government Acts.

At the trial of the action, pursuant to notice given, the plaintiff applied for leave to amend the claim by adding a claim for money had and received by the defendants for the use of the plaintiff. The defendants, as to this amendment, pleaded that, as the agreement under which the money was paid was made with them and the plaintiff and all the other property holders, the plaintiff could not sue for his portion of the money so paid without joining all the other owners as parties to the action.

The case was heard before Hood, J., without a jury, and the following facts were proved in evidence:—In March 1886

the plaintiff and other property holders in Kooyong Koot Road presented a petition to the defendants, requesting the defendants "to take over the said road and proclaim the same as a public highway, with the view of having the road made at the earliest opportunity." The defendants, after considering the petition, passed a resolution, and recorded the same in the minutes, in the following form:—"The petition from residents in Kooyong Koot Road, presented at last meeting, was considered, and it was resolved that the road be taken over by the council on the residents paying one-half the cost of making the road and the whole costs of making the crossing. In the meantime a certified plan to be furnished to the town clerk." An estimate of the cost was made out by the defendants' surveyor, showing a total cost of 1,409*l.*, and making out the proportion payable by the property holders (after allowing certain deductions) as being 680*l.* This information was sent to the property holders. The following letter was sent by the defendants to the plaintiff, among others, in May 1886:—"Some time since the borough council informed property owners in Kooyong Koot Road that it was willing to take over that road, and apply to have it proclaimed a public highway, on payment of the sum of 680*l.* This sum has been apportioned amongst the several property owners according to the frontage owned by each, and the amount payable by you is stated below, a cheque for which, etc." The plaintiff sent his cheque for his proportion in September 1886. The defendants took over the road, and spent a little more than the sum contributed by the property owners in making a portion of the road, but they never appropriated any moneys out of their funds, and never spent any more money upon the road up to the time of the action. In October 1887, in answer to the remonstrances of the plaintiff, the defendants wrote saying that the money contributed by the property owners was only one-half of the total cost of making the road, and that such sum had been laid out in the most advantageous manner. The road was duly proclaimed. In 1891 the plaintiff, after much correspondence had passed between the parties, and no work in the meantime having been done to the making of the whole road, commenced this action. The defendants called no evidence, and took the objection that the plaintiff could

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not recover in this action for money had and received. His Honor, after hearing arguments, gave judgment for the plaintiff for 154*l.*, without costs, for money had and received.

From this judgment the defendant now appealed.

Isaacs and *Mitchell* for the appellants—The defendants expended the money contributed by the respondent and others in making a portion of the road, and the respondent has so far received some consideration, and he cannot now recover the whole of his proportion in this form of action: *Whincup* v. *Hughes* (*a*). A count for money had and received is not maintainable, if the contract has been in part performed. The respondent has received the benefit of the expenditure of the money. The road has been proclaimed and taken over, and has been partly made. If the respondent has been led into a mistake as to the facts, he can bring an action for damages. The appellants would be estopped from saying that there was no contract, if their conduct warrants such estoppel: *Smith* v. *Hughes* (*b*). If the appellants are estopped from saying that there was no contract, the respondent cannot recover in the present form of action; he has his remedy for the breach of such contract. There should have been some demand made for the repayment of the money; an action will not lie for money paid under a mistake of fact when there has been no demand made: *Kelly* v. *Solari* (*c*); *Freeman* v. *Jeffries* (*d*). The contract was a joint contract, and all the parties thereto should have sued. It would be a serious injustice if all the property owners were allowed to bring separate actions to recover the respective contributions paid by them. Counsel also referred to the following cases: *Anglo-Egyptian Navigation Co.* v. *Rennie* (*e*); *Urquhart* v. *Macpherson* (*f*).

Bryant and *Hayes* for the respondent were not called upon.

HIGINBOTHAM, C.J. In this case the action, in its original form, was brought by the plaintiff upon a contract alleged by him to have been made in the month of March 1886 between the

(*a*) L.R. 6 C.P. 78.
(*b*) L.R. 6 Q.B., p. 607.
(*c*) 9 M. & W. 54.
(*d*) L.R. 4 Ex. 189.
(*e*) L.R. 10 C.P. 271.
(*f*) 3 App. Cas. 831.

defendants and the plaintiff and certain other persons, owners of land situated on this road. By this contract it was said that it was agreed between the parties that upon payment by the respective owners of a certain sum per foot the defendants would do three things—take over the said road, and have the same duly proclaimed a public highway; would properly make, construct, channel, and drain the whole of the side of the road; and would keep the same in repair. It is not necessary to refer to the second cause of action, namely, negligence. An amendment was asked for before trial and granted, by which the plaintiff was allowed to claim for money had and received by the defendants for the use of the plaintiff, and the defendants pleaded to that as they had done to the prior claim. The defendants denied that the contract was made at all; they alleged that the section of the *Local Government Act* requiring contracts with municipalities to be in a certain form had not been complied with, and that it was a contract which was beyond the powers of this local body to enter into. They put the original contract in issue in every possible form. Evidence was given at the trial which satisfied the judge, and which, in our opinion, fully justified his conclusion that no contract of the kind alleged had been in fact made, and he appears to have assented to and accepted the arguments of the defendants' counsel, at the conclusion of the case, no evidence being called by the defendants, that even if the contract had in fact been made, it was not in proper form, and was beyond the powers of the defendants to make. The original cause of action, as stated in the original statement of claim, was thus disposed of, and nothing remained of it. The only question remaining arose upon a claim for money had and received, and the judgment of the learned primary judge was founded upon this—that the plaintiff had paid his money under a mistake of facts, and that therefore he was entitled, according to a well-established principle of law, to recover the money so paid from the defendants. Now the question as to what that mistake was has been properly raised and argued. It appears that in the month of March 1886 the plaintiff and a number of other property holders presented a petition to the council, requesting the council to take over this road, and proclaim the same a public highway, with the view of having the road made at the earliest possible opportunity.

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That was the ultimate and further object of the petitioners, viz., in addition to the road being taken over and proclaimed it was to be "made" at the earliest possible opportunity. In answer to that petition, or upon the consideration of the same, it was resolved by the defendants, at a meeting of the 24th March 1886, that the road should be taken over by the council upon the residents paying one-half of the costs of making the road, and the whole of the costs of making the crossings. That was an ambiguous resolution, in this respect, that it omitted to give any indication on the part of the council of its intention to contribute at any particular time, or at all, to the cost of making the other half of the road. The council from that time down to the time of the commencement of this action never appear to have entered into an engagement with these property holders to allot the other necessary half of the costs for completing the road for that purpose out of the municipal funds. The property holders evidently understood that the council were not unwilling to, and that they probably would, contribute the other necessary half of the costs, and they were certainly justified in entertaining that belief when the council's officer prepared an estimate of the amount which would be necessary to make this road. That estimate showed all the items and expenses for completing the road; it showed that the entire costs would amount to 1,404*l.*, and that the half of such costs, less certain deductions, would be 680*l.*, and that was the amount which they demanded from the property owners whose property adjoined this road. These owners consequently assumed, on the best possible grounds, that the council was willing to engage, and did engage, to contribute an equal amount, and to apply that amount with reasonable promptitude to the complete construction of this road. That was not done, and things were allowed to stand over for a long time, and the plaintiff, after four years have elapsed, brings this action to recover the amount which he has paid, and which he says he has paid under a mistaken view of the facts.

We think that the evidence fully justified the judge in concluding that the plaintiff did pay over this money under the mistaken impression that the amount which he and others paid over would be supplemented by an equivalent amount to be appropriated out of the municipal funds, and that the total amount would be applied

with reasonable promptitude to the complete construction of this road. Now, in that view of the case, the questions which have been argued before us appear to be irrelevant to the subject matter with which we have to deal. This is not a case in which the party is trying to avoid a contract on the ground that it has been procured by fraud; if that were so, he could not, according to the authorities cited, succeed in such an action unless the parties could be restored to their original position. In this case, however, the basis of the defence is that there never was a contract at all. That argument was put forward by the defendants themselves, and was accepted by the judge at the trial, and is now beyond all dispute; and there being no contract at all, and the plaintiff having paid his money under a mistaken impression as to what the defendants were willing to do, the defendants seek to retain the money of the plaintiff while they do not carry out the well-founded expectation of the plaintiff as to what they were to do with his money. The plaintiff believed that the defendants were willing and intended to do this work; that was a mistaken impression, and that mistake was not corrected from first to last.

It has been argued that a demand was necessary before the plaintiff could succeed in this action. We do not think that under the circumstances of this case a demand was necessary, and the authorities which have been cited certainly do not support the contention that a demand is necessary in all cases where a plaintiff seeks to recover back as money had and received, money paid under a mistake of facts. In the case of *Kelly* v. *Solari* (*g*), an observation was made that in that case a demand might be necessary, inasmuch as it was a case in which the party receiving the money might have been ignorant of the mistake. In the case of *Freeman* v. *Jeffries* (*h*), in which two members of the Court were of opinion that a demand was necessary, the same reason was assigned. Martin, B. said: "It is clear this action is not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which has been paid was paid under such circumstances as render a part or the whole recoverable back." If the defendant is aware of the mistake by which the money is

(*g*) 9 M. & W. 54.

(*h*) L.R. 4 Ex. 189.

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paid, the reason for that rule entirely fails. The rule itself is quite reasonable; but it only applies where the defendant has no means of knowing that the money has been paid by mistake, and, if he is not aware, he should not be called upon to repay until demand is made and the mistake explained. In this case, the defendants must be taken to have known that the plaintiff, and all the other property holders, believed that the defendants were willing to carry out the three objects that they, the property holders, desired, and when the defendants, knowing that they were not binding themselves to do anything of the kind, but were only willing to take the half of the costs contributed by the property holders, and apply the same as they should think fit, they must be taken to know that the plaintiff paid his share under a mistake of facts. By a letter of the 7th October 1887, the defendants' town clerk wrote to the plaintiff, saying: " . . . . . I have the honour, by direction of the town council, to point out that the sum paid over to the council was only half the estimated cost of properly making the road, and to state that the council is of opinion that such sum was expended to the best advantage and in such manner as to benefit the greatest number of property owners." Now, that was not the purpose for which the money was received; they must have known that that was not the purpose; they received it in consideration that they would pay an equivalent sum themselves. It is no answer to say that they have expended half the money in the way in which they think most desirable for the benefit of all. The money was paid for a quite different purpose. We think that the judge was right, and that the money was paid under a mistake of facts and without any laches on the part of the plaintiff, and therefore it is recoverable as money had and received. I say nothing as to the arguments addressed to us with reference to the possible claims which may be made by the other persons who have paid this money. These persons certainly do not appear to stand in the same position as the present plaintiff, and it may be prudent for them to be well advised before they take any steps to recover their money. The appeal will be dismissed with costs.

WILLIAMS, J. I base my judgment, in this case, upon the ground which may be stated in a few words. I think there is

evidence (and that is all I have to inquire into) to go to the judge, that the plaintiff paid this money under a mistake of facts, and that the defendants knew of that mistake when they took and used the money. Under these circumstances, notice or demand becomes perfectly unnecessary. I think that the learned judge was right.

HOLROYD, J. I concur in the judgment of the Court.

Appeal dismissed with costs.

Solicitor for plaintiff: *Bardwell.*
Solicitors for defendants: *Eggleston, Derham, & Martin.*

W. H. M.

EXPARTE MILLER AND GRAY.

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Feb. 19, 24.
Hood, J.

Stamps Act 1890 (*No.* 1140), *ss.* 70, 71, 98, 97—*Stamp duty—Cancellation of contract for sale of land—Re-transfer of land to vendor—Sale.*

A vendor of land, upon payment of a certain sum by way of deposit, transferred the land to the purchasers, who thereupon mortgaged the property to the vendor to secure the balance of the purchase-money. It was subsequently agreed between the parties that the contract should be cancelled, and that the vendor should retain the amount of the deposit, and that the purchasers should re-transfer the land to the vendor.

Held, that no duty was chargeable upon such re-transfer to the vendor. Under sec. 98 of Act No. 1140 the word "sale" means a sale for money.

THIS was a case stated by the Comptroller of Stamps for the opinion of the Supreme Court, under sec. 71 of the *Stamps Act* 1890. The facts are fully set out in the judgment.

Mitchell for Miller and Gray.

Box for the Comptroller of Stamps.

Cur. adv. vult.

HOOD, J. By a contract made in April 1888 James Miller and Alexander Gray sold certain lands in South Melbourne to the Investment Company of Victoria Limited for 100,000*l.* In

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pursuance of this contract about 20,000*l.* of the purchase-money was paid, and the land was transferred to the purchasers, who thereupon mortgaged the property to the vendors to secure the due payment of the balance. In September 1891 a deed was executed between the vendors and the purchasers by which (after reciting that 78,000*l.* of the purchase-money remained unpaid, and that the company was desirous of not proceeding further) the parties agreed that the contract should be cancelled and put an end to, upon the terms that the vendors should retain all moneys paid, and that the company should execute all documents necessary to revest the lands in the vendors. In pursuance of this agreement and to give effect thereto, the company re-transferred the property to Miller and Gray on the 3rd September 1891, or, in other words, the purchasers forfeited all moneys paid, the contract was cancelled, and the property restored to its original owners. Upon this the Collector of Imposts, or Comptroller of Stamps, was requested by Miller and Gray to express his opinion under the 70th sec. of the *Stamps Act* 1890, as to whether any, and if any, what amount of, duty was chargeable on the re-transfer. The collector thereupon expressed his opinion to the effect that, inasmuch as the property transferred was in satisfaction of a debt due by the company to Miller and Gray, the transfer was chargeable with duty under sec. 97. Miller and Gray being dissatisfied with this opinion, a case has been stated under sec. 71 by way of appeal to this Court.

By the *Stamps Act* an *ad valorem* duty is chargeable on a "conveyance or transfer on sale of any real property," and by sec. 93 this expression is defined as including every instrument whereby any property, upon the sale thereof, is legally or equitably transferred to, or vested in, the purchaser. By sec. 97 it is enacted that when any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, such debt is to be deemed the whole or part (as the case may be) of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty. For the collector's view, it was first argued that sec. 97 covers this case, and itself imposes a duty on this transfer. With this contention I do not agree. Sec. 97, in my opinion, is merely in aid of the general power of taxation, by affording a mode of estimating the duty in cases of

executed considerations. It does not of itself create any obligation to pay duty. It pre-supposes a document liable to duty, and then directs how that duty is to be ascertained, viz., by including the amount of the past debt in the consideration upon which the *ad valorem* duty is assessed.

The main argument, however, turned upon the contention that this dealing with the land was a "sale" within the meaning of sec. 93. The re-transfer of the land was clearly a passing of the property for a valuable consideration, and if the word "sale" is to have this extended meaning the document was liable to duty. But in construing an Act of Parliament the words should, as a rule, be interpreted according to their ordinary sense: *Cull* v. *Austin* (*a*); and taxes or charges on the subject should be imposed in clear and unambiguous language: *Commissioners of Revenue* v. *Angus* (*b*). Taking, therefore, the common meaning of the words, is this case plainly within the Statute? The answer to this depends greatly upon the meaning to be given to the word "sale." Every sale includes (1) an agreement or a bargain, (2) the payment of the price, and (3) the delivery or the conveyance of the property. In its ordinary meaning "sale" implies a transfer of the property in a thing for a *price in money*, and is so distinguished from "exchange" or "barter": *Benjamin on Sales*, 1; and in common parlance a seller disposes of his lands at an adequate price, which the purchaser pays: *Denn* v. *Diamond* (*c*). The contention that the word "sale" infers a price in money in sec. 93 of the *Stamps Act* receives support, not only from the fact that such is the natural meaning, but also from looking at secs. 95, 96, and 97 of that Act. By these sections the Legislature has provided for cases of sales where the consideration is not the payment of money in the ordinary sense, and those sections would be unnecessary if the extended meaning, argued for on behalf of the Collector of Imposts, were correct; and it is also to be noticed that sec. 78 of the English Act, 33 & 34 Vict., c. 97, which imposes a duty upon conveyances, other than those on sale or mortgage, has not been enacted in Victoria. I think, therefore, that "sale" in sec. 93 of the *Stamps Act* means a sale for money.

(*a*) L.R. 7 C.P., at p. 234. (*b*) 23 Q.B.D., at p. 589.
(*c*) 4 B. & C., at p. 245.

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This disposes of the more extended argument for the respondent, but it does not determine the matter, for it leaves untouched the point as to this case being a sale for a past consideration within sec. 97. But in my opinion, before sec. 97 can apply, there must have been a sale of property so as to cause the duty to attach, and the real question is, was this a "sale of real property?" To determine this matter it is not sufficient to look only at the form into which the parties have thrown their dealings, for in order to decide whether duty is payable or not the substantial matter of the agreement is alone to be looked to: *Christie* v. *Commissioners of Revenue* (*d*); *Jamieson* v. *Renwick* (*e*). Now, the substance of the transactions between the parties here was not the sale or re-sale of this property. The bargain or agreement was not in substance about the sale of anything, but about the cancellation of the original contract. That cancellation involved, no doubt, the return of the property, and the giving up of a past debt, but the transfer of the property was not made by reason of any sale, but was incidental to the cancellation, and I cannot think that the land was sold or re-sold, or that Miller and Gray can reasonably be called purchasers thereof. It is said that this view leads to an evasion of the Act. I do not think it does, for I do not think that an Act of Parliament can be evaded in the sense suggested. I prefer to say that the case is not within the Act, and that therefore the document is not liable to duty. This being my opinion, I accordingly determine that the assessment was wrong, and I order that the Comptroller of Stamps repay to the appellants the amount of duty paid by them, together with the costs incurred by them in relation to this appeal.

Solicitors for Miller and Gray: *Smith, Emmerton & Johnson.*
Solicitor for the Comptroller: *Guinness*, Crown Solicitor.

W. H. M.

(*d*) L.R. 2 Ex. 50.

(*e*) 17 V.L.R. 124.

[IN CHAMBERS.]

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Feb. 25, 29.

Hood, J.

IN RE OPITZ.

Insolvency Act 1890 (*No.* 1102), *sec.* 37, *sub-sec.* 8—*Lunatic.*

Sub-sec. 8 of sec. 37 of the *Insolvency Act* 1890 cannot apply to a lunatic. *In re Bayldon* (2 V.L.R. (I.) 85) distinguished.

THIS was a petition presented by the London Chartered Bank for the sequestration of the estate of Franz Opitz, a lunatic.

Higgins in support cited *In re Bayldon* (*a*).

Cur. adv. vult.

HOOD, J. In this case the London Chartered Bank presented a petition for the sequestration of the estate of Franz Opitz, a lunatic, confined in the Yarra Bend Asylum. In support of the petition I was referred to *Re Bayldon* (*a*). That decision is very briefly reported, and though the objection was taken that a lunatic cannot be made insolvent, no reference to the point is made in the judgment, but the order was made absolute, the learned judge apparently acquiescing in the statement of counsel that there was nothing to show that the alleged lunatic was not quite sane in matters of business. I understand, however, that the documents show that the petition there was founded upon sub-sec. 5 of sec. 37 of the *Insolvency Statute*.

The act of insolvency created by that sub-section does not necessarily depend upon any act of the debtor, or upon his volition or state of mind. But in this case the petition is based upon sub-sec. 8, and I think that the proviso to the latter sub-section makes a most material difference. The proviso requires that the debtor shall be called upon to satisfy the judgment, and shall fail to do so. It does not seem to me that this can apply to a lunatic, as so much depends upon his own acts: *Re Willison* (*b*); *Re Hodgson* (*c*); *Yate Lee*, 76; *Pope on Lunacy*, 368; and cases there cited; unless during lucid intervals, if any. An affidavit has been filed here to show that the debtor understood the nature of the demand made upon him, but I am not satisfied that he did. There is no evidence as to his state of mind by any skilled person,

(*a*) 2 V.L.R. (I.) 85. (*b*) 4 V.L.R. (I.) 67. (*c*) 5 A.J.R. 133.

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or by any one having an opportunity of forming a proper opinion. I therefore refuse this application upon the present materials, without prejudice to a further application, though it must not be assumed that I would have made the order even if satisfied upon this point, for much might turn upon the debtor's answer to the demand. In addition, the papers do not set out any authority in the person presenting the petition.

Solicitors for petitioner: *Attenborough, Nunn & Smith.*

A. F. M.

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Feb. 15, 16, 29.

SANDER *v.* THE QUEEN.

"Land Act 1884" (*No.* 812), *ss.* 27 (8), (10), (13), 29, 68—*Pastoral lease—Resumption of land by Crown for mining purposes—Payment of fees on application for selection—Order in Council ultra vires.*

By a lease dated the 1st July 1890, and issued under sec. 21 of the "*Land Act* 1884," the petitioner became lessee from the Crown of a pastoral allotment for the term and on the conditions therein specified. The lease contained a condition as prescribed by sec. 27, sub-sec. 8, and providing: "Her Majesty, her heirs and successors, may at any time, and from time to time during the said term, resume possession of any part or parts of the land hereby demised which may in the opinion of the Governor, with the advice aforesaid, be required for the purposes of water supply, etc. . . . . or for mining purposes."

On the 1st of September 1890 the petitioner lodged an application, under sec. 29 of the *Land Act* 1890 (sec. 29 of the "*Land Act* 1884"), in the form prescribed by regulations made under the Act, to select 320 acres, portion of the allotment. On the same day, but at a later hour, possession of the whole allotment was resumed for mining purposes by order of the Governor in Council, purporting to be made under the above condition in accordance with sec. 27, sub-sec. 8. Petitioner, on the 26th September 1890, tendered to the proper officer the proper amount of money in support of his application to select, but in consequence of the Order in Council the money was not accepted. The petitioner then presented a petition, under the *Crown Remedies and Liabilities Act* 1890, alleging that the Order in Council was null and void, inasmuch as the same was *ultra vires*, and that the petitioner was entitled, upon payment of 320*l.*, to a grant in fee simple of the land which he applied to select.

Held, that the Governor, having power under the prescribed condition of the lease contained in sec. 27, sub-sec. 8, to resume any part or parts of the land demised from time to time, had also power to resume the whole at once, and that the Order in Council was valid.

Held also, that on application to select under sec. 29 of the *Land Act* 1890, the payment of 1*l.* per acre is a condition precedent to, or concurrent with, the right to select, and unless there be either payment, or readiness and willingness to pay, no right to select exists.

Hood, J. (17 V.L.R. 8), confirmed.

APPEAL from judgment.

The facts are fully set out in the judgment of Hood, J., 17 V.L.R. 8.

Madden, *Topp*, and *Hayes* for the appellant—If it was desired to resume all this land, the order should have been made under sub-sec. 13 of sec. 27, or under sec. 68. Sub-sec. 8 applies only to the case where some small portion of the land is required, if it were required for mining purposes, for instance, it would be in such a case as a small portion of the land being required for the mouth of a shaft, etc. Sub-sec. 8 contemplates the resuming of small portions, for which compensation would not be required. The petitioner undertook to pay the sum of 1*l.* per acre for the land he applied to select, and that is sufficient to satisfy the provisions of sec. 29.

J. D. Wood and *MacHugh* for the respondent—In a case under this Act the lessee has to take the chance of a bad bargain. The last clause of sec. 27 allows the insertion in the lease of such other conditions and provisions as the Governor in Council may direct to be inserted therein. In sub-sec. 8 itself the terms "any of the land" and "such lands" are used indiscriminately. In the condition in the lease power is given to resume "any part or parts" of the lands demised, and that being so power is given to resume the whole. The payment of 1*l.* per acre is a necessary condition precedent before the petitioner can exercise his right to select under sec. 29.

The following authorities were cited:—*Regina* v. *Cowie* (*a*); *Doe d. Gardiner* v. *Kennard* (*b*); *Liddy* v. *Kennedy* (*c*); *Mott* v. *Peel* (*d*); *Weston* v. *Collins* (*e*); *Lord Ranelagh* v. *Milton* (*f*).

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HOLROYD, JJ.]. The petitioner was a lessee under a lease of a pastoral allotment, containing

(*a*) 7 V.L.R. (L.) 88.
(*b*) 12 Q.B., at p. 253.
(*c*) L.R. 5 E. & I. App. 134.
(*d*) 2 V.R. (M.) 27.
(*e*) 34 L.J. Ch. 353.
(*f*) 2 Dr. & Sm. 278; 34 L.J. Ch. 327.

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26,600 acres of land, dated 1st July 1890, and issued under sec. 21 of the *Land Act* 1890. The terms of all leases issued under this section must expire not later than fourteen years after 29th December 1884, and at the end of the term the land and all improvements, with certain exceptions, revert absolutely to the Crown. The term of the lease to the plaintiff was for a period of eight years and six months, less three days, and would expire at the extreme limit of all such leases on 29th December 1898. On 1st September 1890, the petitioner lodged an application, under sec. 29 of the Act, in the form prescribed by regulations made under sec. 142, to select 320 acres, portion of the allotment. On the same day, but at a later hour of the day, possession of the whole allotment was resumed for mining purposes by order of the Governor in Council, purporting to be made under a condition of the lease in accordance with the condition contained in sec. 27, sub-sec. 8, and required by sub-sec. 1 of the same section to be inserted with other covenants (a term which appears to include conditions) in every lease of a pastoral allotment.

The petition alleges that the Order in Council is null and void, inasmuch as the same is *ultra vires*, and that the petitioner is entitled, upon payment of 320*l.*, to a grant in fee simple of the land which he applied to select. Three questions were argued and determined in the Court below. The same questions have been argued before this Court on appeal from the judgment of the primary judge. The first of these questions is—Whether the whole of the allotment can be resumed by one order of the Governor in Council under the prescribed condition of the lease contained in sub-sec. 8 of sec. 27. If this condition stood by itself, and had to be construed apart from the conditions in sub-secs. 10 and 13 of the same section, and from the provisions of sec. 68, it is hardly disputed that it would authorise the resumption by one order of the whole of the land demised by the lease. The use of the words "any of the land" does not apply any restriction. The right to resume every part, and by a single act of resumption, results from the reservation of the right to resume any part: *Per* Denman, C.J., in *Doe d. Gardner* v. *Kennard* (*g*); *Regina* v. *Cowie* (*h*); *Liddy* v. *Kennedy* (*i*). But we were strongly pressed

(*g*) 12 Q.B. 253. (*h*) 7 V.L.R. (L.) 88. (*i*) L.R. 5 E. & Ir. App. 134.

in the argument to consider sub-sec. 8 in connection with sub-secs. 10 and 13, and with sec. 68, and to apply a construction to each of these provisions of the Act of Parliament consistent with the others, and with the various occasions and circumstances under which land held under a pastoral lease may be resumed for mining purposes. We are of opinion that it is impossible to do this. It has been suggested that these different provisions of the Act constitute a graduated scale according to which, where the quantity of land required for resumption is very small, no compensation for the value of the land resumed or improvements is to be given; where the quantity required is larger, but less than the whole, some compensation is to be given; and where the quantity required comprises the whole of the land leased, full compensation for the value of the land and of the improvements is to be given. If this interpretation is to be accepted, the condition contained in sub-sec. 8 only applies to cases where the quantity of land to be resumed is very small, and the Governor in Council has no power to resume a large part or the whole of the land. But according to this view of the condition, great violence has to be done to the terms of the condition. The majority of purposes of resumption enumerated in the condition undoubtedly require only a small quantity of land to be taken out of a large area. But some of the enumerated purposes, notably mining purposes and forest or timber reserves purposes, might require the resumption of a large part or of the whole of the land included in the lease; and the only answer that has been offered to this obvious difficulty is that the word "purposes" in these cases must be taken to mean purposes incidental to forest and timber reserves and mining operations already existing and requiring the resumption of a small piece of land only. Such a construction also requires a different meaning to be placed on the same words, "for mining purposes," in this sub-section and in sub-sec. 10, where, according to the argument, a much larger though undefined quantity may be resumed, and in sec. 68, where, according to the same argument, the whole may be resumed for the same purpose. Moreover, it requires an entirely different construction and effect to be given to this sub-sec. 8 of sec. 27, and to sub-sec. 10 of sec. 88 of the Act. This latter sub-section contains a power of reservation and resumption of land in a grazing area in the same terms as the

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power in sub-sec. 8 of the earlier section—"upon payment to the lessee for his interest in such lease," together with the value of improvements. These words imply that upon payment for the interest in the lease the lease shall be at an end, and the Governor in Council may resume possession of the whole of the land included in the lease. We should violate the rules of sound construction of an Act of Parliament if we held that the power of resumption created by identical words in these two sub-sections differs in degree and in effect, because compensation is given upon the exercise of the power in the one case and is not given in the other case. There is a distinction between the power of resumption in sub-sec. 8 and that contained in sub-sec. 10 of sec. 27. In sub-sec. 8, to justify the resumption the Governor in Council is required judicially to determine that the land is presently required for some one or more of the purposes enumerated, but no such provision is contained in either of the other two sub-sections of sec. 27, or in sec. 68. Such are some only of the difficulties that meet the attempt to limit the power of resumption of the whole of the land contained in a pastoral allotment.

We concur in the further weighty observations on this question contained in the judgment of the learned primary judge, and in his conclusion that the respondent, having power under the prescribed condition of the lease contained in sec. 27, sub-sec. 8, to resume any part or parts of the land demised from time to time, had also power under the same condition to resume the whole at once, and that the Order in Council is accordingly valid.

The second question is whether, assuming the Order in Council to be valid, the petitioner has not acquired an enforceable right under sec. 29 of the *Land Act* 1890 to select a portion of the allotment as a homestead by virtue of the lodgment of his application, in accordance with the regulations, on 1st September 1890, and before the making of the order. The answer to this argument is, that the Act of Parliament gives the right to select only "on payment" of 1*l.* per acre for each and every acre comprised in the homestead lot. These words constitute, in our opinion, a condition either precedent to or concurrent with the right to select, and unless there be either payment or readiness and willingness to pay, no

right to select exists: *Campbell* v. *Bent* (*k*); *Lord Ranelagh* v. *Milton* (*l*); *Painter* v. *James* (*m*). The regulation giving a form of application by the intending selector is perfectly consistent with the Act; it merely directs what the selector shall do when he intends to select. The making of an application in accordance with the regulation is not a selection, and it confers no right until the statutory condition is complied with.

An amendment of the pleading was allowed at the hearing, by which the petitioner raised a third question, namely—Whether, assuming payment to be a condition of his acquiring any right, the respondent was not estopped from setting up that condition, or had not waived its performance by reason of the form of application prescribed by the regulation which the petitioner strictly followed? To this it is answered that the regulation in question does not purport to estop, and that it has not the effect of estopping the respondent from setting up the statutory condition; that the regulation, if it had such effect, would be *ultra vires*; and that the petitioner had not any evidence to show that he was induced in fact by the form of application prescribed to refrain from paying or tendering payment of the money, even supposing that payment or tender could have had at that stage any effect.

The appeal will be dismissed, with costs. The judgment appealed from will be affirmed.

Solicitor for petitioner: *Waxman.*

Solicitor for respondent: *Guinness*, Crown Solicitor.

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(*k*) 6 V.L.R. (L.) 117.

(*l*) 2 Dr. & Sm. 278; 34 L.J. Ch. 327.

(*m*) L.R. 2 C.P. 348.

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March 7.

Holroyd, J.

[IN CHAMBERS.]

QUINN *v.* MACARTNEY.

Supreme Court Act (*No.* 1142), *s.* 85—*Wilful neglect of defendant to appear—Affidavit, sufficiency of—Practice.*

In an application under sec. 85 of Act No. 1142 for liberty to proceed in an action, the affidavit in support of such application must show circumstances and facts from which a judge may conclude that the defendant's omission to appear has been wilful, or that he is living out of the jurisdiction in order to defeat and delay his creditors.

A mere statement in an affidavit that the defendant has wilfully neglected to appear to the action is not sufficient.

THIS was an application under sec. 85 of the *Supreme Court Act* 1890 for liberty to proceed in the action, and that the amount for which final judgment was to be signed should be ascertained by the prothonotary. The usual affidavit had been filed setting forth the cause of action, and showing that it arose within the jurisdiction, and alleging that the defendant had no defence to the action. It was also stated that the defendant had been personally served with a true copy of the writ. The clerk of the plaintiff's solicitor deposed on affidavit that the time for appearance had expired, and that search had been made in the proper office, and that no appearance had been entered, and then added these words—"The defendant wilfully neglects to appear to the said writ."

The managing clerk of the plaintiff's attorney in support of the application.

[HOLROYD, J. I do not think that the materials are sufficient to warrant my granting this application.]

It has been the practice to grant applications made in this form.

[HOLROYD, J. A bald statement that the defendant "wilfully neglects to appear" is most inadequate, and I certainly should require some facts to be stated before I shall draw such a conclusion. However, as it has been stated that the practice has been to accept such a statement, I shall consider my judgment.]

Cur. adv. vult.

HOLROYD, J. Some days ago an application was made to me, under sec. 85 of the *Supreme Court Act* 1890, for liberty to

proceed in this action, and that the amount for which final judgment was to be signed, should be ascertained by the prothonotary. That section requires, that before granting such liberty, the Court or judge is to be satisfied, by affidavit, that, amongst other things, the writ was personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof upon him, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the Court in order to defeat and delay his creditors. The plaintiff made the usual affidavit setting forth the cause of action, showing that it arose wholly within the jurisdiction of the Court, and alleging that the defendant had no defence. It further appeared by the affidavit of Peter Macpherson, clerk to a solicitor of Sydney, that on the 4th of February last, the defendant, who is described in the writ of summons as a bank manager, had been personally served at No. 72 King Street, Sydney, with a true copy of the writ. The writ itself showed that the time for entering an appearance had recently expired, and I was informed by Mr. Proctor, a clerk of the plaintiff's solicitor, that no appearance had been entered for the defendant. I was asked to accept Mr. Proctor's statement to that effect without an affidavit, and also from the bare facts of service and non-appearance to draw the conclusion that the defendant wilfully neglected to appear to the writ. This I declined to do.

The application was renewed on the following day, 2nd March, Mr. Proctor having, in the meantime, supplemented his previous proofs by an affidavit of his own, in which he set forth that the time for appearance expired on the 24th of February, that he had searched in the proper office on the day of the renewed application, and found that no appearance had been entered by the defendant or his solicitor, and then added these words—"The defendant wilfully neglects to appear to the said writ." Mr. Proctor, as I understood him to say, had no knowledge of any other facts to warrant this positive assertion than those before mentioned; and, in my opinion, the swearing thus roundly to facts of the truth of which the deponent cannot possibly be assured, is, to say the least, a very lax and improper

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practice. Mr. Proctor might, however, have conscientiously sworn that he believed the defendant wilfully neglected to appear, if in reality he so inferred from the defendant's having been served and not having appeared within the prescribed time; and the question arises whether proof of service of the writ upon the defendant and of his non-appearance within the prescribed time, coupled with a statement upon oath, made by the plaintiff or his solicitor, or, as in this case, by the solicitor's clerk, of his belief that the defendant wilfully neglects to appear to the writ without any other facts being disclosed by the affidavits, from which an inference can be drawn one way or the other, ought to satisfy the Court or judge that the defendant is guilty of this wilful neglect. It has never been my practice to regard such evidence as sufficient, but, as I have been informed that orders for leave to proceed have sometimes been granted upon precisely the same evidence, I have been led to reconsider my opinion, and, having reconsidered it, I am the more confirmed in it. For of what is the judge to be satisfied? Not merely that the defendant neglects to appear, but also that his neglect is wilful. If wilful neglect to appear was meant to be inferred from the defendant's not having appeared within the time limited after having been duly served, the Legislature would have simply required proof of such non-appearance. Non-appearance might, without inaccuracy, be described as neglect to appear; but wilfully neglecting to do a thing implies more than merely leaving it undone. It may, undoubtedly, be often very difficult to prove wilful neglect; and the judge will usually, I should think, be able to collect from very slight circumstances, added to the fact of non-appearance, the intention not to appear. But, according to the plain language of the Act, the added circumstances, from which the judge may conclude that the omission to appear was wilful, must be brought before him by affidavit; and the judge must form his conclusions for himself, and not accept anybody else's belief as a substitute for his own judgment. The 85th section of the *Supreme Court Act* 1890, is an adaptation of the 18th section of the English Common Law Procedure Act 1852, and Day (*Common Law Procedure Acts*, 4th ed., p. 57) says, in a note to that section, that the defendant's wilful neglect to appear will be presumed after the writ has come

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to his knowledge. Day cites no authority for that proposition, and he is in direct conflict with Chitty, who, in his forms (10th ed.), has sketched out affidavits to fulfil the requirements of the 18th section of the Common Law Procedure Act 1852, and, in a note to one of the paragraphs (see p. 69, also 67), thus expresses himself:—

"The plaintiff, or the person who had the serving of the writ, or some other person, should swear to the residence of the defendant abroad, and to the distance of it from England; to facts showing that the defendant either wilfully neglects to appear, or that he is living out of the jurisdiction in order to defeat and delay his creditors. The facts must be so stated as to satisfy the judge that such is the case. After stating the facts, the affidavit may conclude thus: 'For the reasons aforesaid I verily believe that the defendant wilfully neglects to appear to the said writ'; or, 'That the defendant is living out of the jurisdiction in order to defeat and delay his creditors.' There should be an affidavit stating that there has been a search in the proper office for the defendant's appearance, and that there is none."

Where a deponent swears to facts from which a judge is asked to draw a certain conclusion, the averment of the deponent's belief may be useful to show that he has made a full disclosure, and knows nothing contrary to the conclusions suggested. For any other purposes I think it worthless; but with that qualification, if indeed it be a qualification, I assent to the rule which Mr. Chitty has laid down. Upon the materials now before me I refuse the application.

Solicitor for plaintiff: *Boyd.*

W. H. M.

McMECKAN *v.* AITKEN AND ANOTHER.

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Feb. 5, 8, 9, 10.
March 8.

New trial—Verdict against evidence—Report of judge—Practice—Testamentary capacity.

In a motion for new trial, on the ground that the verdict was against the weight of evidence, the Court of Appeal has a right to consult the primary judge as to whether he was satisfied with the findings of the jury.

The Court of Appeal is not bound by the opinion of the primary judge as to the findings of the jury, but has still to consider whether there was evidence in the case of such a nature that a jury of reasonable men could not, or ought not to, have arrived at a conclusion in favour of the respondent.

THIS was a motion for a new trial on the ground that the verdict of the jury was against evidence and the weight of evidence.

The action was tried before Higinbotham, C.J., and a jury of twelve. The plaintiff in the action, who was one of the next-of-kin of James McMeckan, instituted these proceedings to obtain

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revocation of probate of a will executed by the deceased on the 1st June 1888, to have such will declared invalid, and to revive a previous will and the codicils thereto which the deceased had purported to cancel at the time he executed the will in 1888. The grounds set up by the plaintiff were that undue influence had been exercised by another next-of-kin, and that the deceased was not of sound mind and of testamentary capacity at the time the said will of June 1888 was executed. The defendants in the action were the executors under the will of June 1888, to whom probate had been granted. The jury found that there had been no undue influence exercised in procuring the execution of the contested will of June 1888, but they found all the other issues in favour of the plaintiff. The defendants now moved for a new trial.

J. Dennistoun Wood and *Madden* (*Johnston* and *Coldham* with them) for the defendants in support of the motion.

Purves, Q.C., and *Topp* for the plaintiff to oppose.

Cur. adv. vult.

Williams, J., delivered the judgment of the Court [Williams, a'Beckett, and Hodges, JJ.] In this action the jury found in favour of the plaintiff upon the issues—(1) That the testator was not of sound mind and capable of executing a testamentary document prior to and at the time of executing the will dated the 1st day of June 1888; and (2) That he was not of sound mind and testamentary capacity when he cancelled the will of 24th of February 1870, and the codicils thereto dated respectively 25th of October 1875 and 19th of February 1877. Upon these findings the learned Chief Justice, before whom the action was tried, ordered judgment to be entered for the plaintiff, and the defendants now apply to us to order these findings to be set aside, and to grant a new trial upon the grounds that these findings are against evidence and the weight of evidence.

At the outset it is right that I should state that we have, in considering this application for a new trial on the ground of the findings being against evidence, asked the learned Chief

Justice whether he is satisfied with the findings. He has informed us that he is not satisfied with the findings of the jury, and that, in his opinion, they are wrong findings. As our right to thus communicate with the Chief Justice was questioned during the argument, I may state that the case of *Webster* v. *Friedberg* (*a*) is a distinct authority for the step we have taken. There is, no doubt, abundant evidence in the present case which would have justified a jury in coming to a contrary conclusion, namely, to a conclusion in favour of the defendants, but that is not the proposition which we have to consider upon the present application. The proposition we have to consider is this:—Have the appellants satisfied us that a jury of reasonable men ought not to, or could not upon the evidence adduced at the trial, arrive at the conclusions come to by the jury in the present case? *Webster* v. *Friedberg*.

In considering this proposition, though we are not bound by the opinion of the learned Chief Justice, yet we are bound to take it into our serious consideration: *Webster* v. *Friedberg*; and were it not for that opinion we should have felt less hesitation in coming to the conclusion at which we have arrived upon the present appli-tion. Keeping this opinion in mind, is there evidence in this case of such a nature that a jury of reasonable men could not, or ought not to, arrive at a conclusion in favour of the plaintiff upon the the issues submitted? To enable us to answer this question, a careful review of the whole of the evidence becomes absolutely necessary. The evidence may be divided into three classes:—(1) The medical evidence; (2) That of relations, friends, and acquaintances of the testator; (3) The evidence of the testator's legal adviser, and the evidence of the wills of 1870 and 1888, and of the facts and circumstances connected with their execution.

It appears that up to the 9th of March 1888 the testator, for so old a man, was both mentally and physically active and vigorous. Upon that date he undoubtedly had a seizure of a serious kind whilst lunching at his club, and after the date of that seizure the weight of the evidence shows that he became in a marked degree less vigorous and active in both mind and body. These are facts upon which not only is there sufficient evidence to go to a jury, but

(*a*) 17 Q.B.D., p. 736.

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which the weight of the evidence clearly establishes. Now, applying the medical evidence adduced for the plaintiff to these facts, it is to the effect that the seizure at the club on the 9th of March must have been of a cerebral nature, and that within a very short period thereafter he was undoubtedly suffering from disease of the brain —softening of the brain or an embolism of the brain—and that this disease was of a progressive nature. It is true that there is much medical and other evidence to the contrary, evidence to show that the attack on the 9th of March was of a cardiac character, and that the subsequent symptoms were also of the same nature, and that what the testator was suffering from on that date and thereafter was disease or fatty degeneration of the heart; and had the case rested upon the medical evidence adduced for the plaintiff we should have had no hesitation in setting aside the findings of the jury.

But there is evidence in the case to support the medical opinion that the testator was, on and after the 9th of March and up to the date of his death, suffering from some disease of the brain. Part of the evidence to which we refer is that of numerous witnesses, relatives, friends, and acquaintances of the testator, who testify to the following facts:—That from the date of the seizure on the 9th of March a very marked mental and physical change for the worse took place in the testator, according to many of those witnesses a change progressive from bad to worse; that after that date his speech became indistinct, thick, and almost unintelligible; his memory greatly impaired; his evacuations for a time involuntary; his power of vision reduced and confused; his gait shuffling and feeble; that he became more hard of hearing, unable to read or to write (except his signature to cheques), or to keep his accounts; that whereas he had been before in the constant habit of going into town two or three times a week to attend to business, he only did so upon one occasion after that date; that he had to be watched; that he could not be trusted with documents, or even to get the postal delivery as had been his custom. I do not say that all the witnesses to whom we have referred speak to each one of these facts, but some depose to one fact and some to another. Some of these facts are deposed to by the principal witness for the defendants, Grace Mackie, as for instance, the testator's infirmity

as to his evacuations, his inability to write, to keep his accounts, to visit town, the necessity for having him watched, the reluctance to trust him with the care of documents or letters. The period of time covered by these witnesses is that from the date of the seizure on the 9th of March up to the 16th of May 1888, and again that from the 1st of June 1888 up to a date shortly before the testator's death. It is true that to a very great extent, if not entirely, the period from the 16th of May 1888 to the 1st of June of the same year is not covered by the evidence relied upon for the plaintiff; but it is a legitimate inference to draw that the testator was in no better condition, either physically or mentally, between those dates than he was in before the one and after the other.

Now it may be contended, with some force, that this evidence more or less tends to support the medical opinion that the testator was afflicted with disease or softening of the brain, and that this disease was progressive; but with still greater force may it be contended that, if this evidence is to be believed, it may reasonably lead to the inference that, at any rate from and after the 9th of March, a break-up of the testator's mind and body had set in, and that from and after that date he was suffering from progressive senile decay, greatly impairing mental faculty and physical power, rendering his mind dull, torpid, and sluggish, his memory defective and unreliable, his speech unintelligible, producing inability to read or to write, rendering him incompetent to transact any matter of business or importance, reducing him from his former condition of mental and physical capacity and vigour to a comparatively helpless and childish condition. May not a jury then, upon the evidence to which we have thus far referred, reasonably arrive at the conclusion that when the testator gave the instructions to his solicitor for his will on the 16th of May 1888, and thence up to and including the 1st day of June 1888, he was suffering from progressive and advanced senile decay, that from its effects his mental faculties were at those dates greatly enfeebled and deadened, and that his memory, though not altogether gone, was most faulty, unreliable, and treacherous? If so, then this conclusion may reasonably form a material element in guiding them to their conclusion upon the main question, viz., as to whether, prior to and at the time of executing the will of the 1st of June and of

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destroying the will of the 24th of February 1870, and the codicils thereto attached, his mind had a sufficient grasp of the nature and extent of his devisable property, of those who might be considered to have claims upon him, and of the nature of those claims. If that inference be not unreasonable in the inference as to the state of the testator's mental faculties at the dates specified, it may reasonably guide the jury to their further conclusion that when the testator was called upon to give instructions for and to execute a will, and to destroy a previous will, it would at any rate be necessary to take special pains, and make special and careful effort, to rouse his mind and memory to a proper and sufficient appreciation of those circumstances which we have just mentioned, and that without these precautions and safeguards being taken he would not possess the requisite mental testamentary capacity.

This brings us to a consideration of the third class of evidence, that of the wills of 1870 and 1888, of the facts and circumstances connected with their execution, and that of the testator's legal adviser, Mr. Klingender. The more this class of evidence is considered, the more important it becomes, as supporting the theory of senile decay and its detrimental effects upon the mental powers of the testator, and as strengthening the contention for the plaintiff that, when the testator gave instructions for the will of 1888, and when he executed it, his mind and memory were not in a condition to entitle him to be considered as possessing sufficient testamentary capacity.

In 1870 the testator's devisable property did not amount to 20,000*l.* He was then admittedly a man of powerful and active mind. In that year he made a will (Exhibit F) by which he distributed the whole of this property amongst the persons named in that will. He was clearly of opinion that after satisfying these bequests there would be no residue; but, in the event of there being a residue, he instructed his solicitor to insert in the will that the residue was to be divided amongst the *relatives*. In other respects the will of 1870 was drawn up in accordance with the instructions of the testator; but as to the residue, which the testator believed to be *nil*, by the will it was divided amongst the legatees, not amongst the relatives. Under the will of 1870 the Mackies (five in number) got 4,400*l.* amongst them; the present

plaintiff 1,000*l.* Between 1870 and 1888 the testator's property and its value increased enormously; in 1888 its value was something under 130,000*l.* Had the will of 1870 stood, after satisfaction of the legacies, the very large residue would have been divided amongst the legatees under that will. Now, was the testator in 1888 sufficiently alive to the altered condition of his estate; to the effect that altered condition would have upon the beneficiaries under the will of 1870; to the fact that in 1888 that residue, which in 1870 was *nil*, was the substantial bulk of his property, and that the specific legacies were an insignificant part? We think there is evidence that he was not. He apparently never thought of altering the disposition of his property, or of any necessity for any alteration. He seems to have been perfectly satisfied that his property should go as he had intended it should go years before. He had no spontaneous desire to give one more and another less than he had given before, and but for the suggestion of a friend we may reasonably suppose that no new will would have been made. He had to be stirred up (so to speak) into sending for his legal adviser. This is shown by the following passage of the evidence of Mr. Aitken:—"Well, you have got over that attack; perhaps you won't get over another so easily; have you settled your affairs?" The testator: "Oh, I have got a will." Aitken: "But things are changed very much since 1870 with you; you had better let me send Mr. Klingender out to you, and have it overhauled." In consequence of this conversation the testator asked Aitken to send Mr. Klingender (his solicitor) out to him. Aitken does this on the 14th May, and on the same day Klingender goes out to see the testator, taking with him the instructions for the will of 1870. Turning now to the solicitor's evidence he states: "I said, 'Mr. Aitken tells me you want to see me professionally.' He replied that he wanted to see me about his will; that a great number of the people named in his former will had died, and that things had changed very much since the old will was made. I then produced the paper (Exhibit No. 4), and said, 'Now, Captain, I'll read over the names of the people mentioned in the old will, and you will tell me which of them are dead.'" Klingender then states that he read through the names, and took directions of various kinds from the testator as to leaving one name in and striking another

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out, and his evidence then proceeds as follows:—"Having got that information I said, 'Now, what is your will to be?' He said: 'The same as the old will, and I'll add a legacy to the Ladies' Benevolent Society.' I said: 'What amount?' He said: '500*l.*' I said: 'What is to become of the residue?' He said: 'That is to be divided amongst the Mackie family.'" Now, it is to be observed that throughout this interview and conversation, though the testator's property is at that time of the value of about 130,000*l.*, he makes no change, nor suggests any change, in the specific legacies to the various legatees mentioned in the will of 1870. Those legacies virtually absorbed the whole of the testator's property in 1870. In 1888 they represented a very insignificant portion of it, and when he is asked the important question: "Now, what is your will to be?" his answer is: "The same as the old will, and I'll add a legacy to the Ladies' Benevolent Society." That is the only alteration he desires to be made so far as regards the legacies specified in the old will, beyond striking out some of them, and though he strikes out some of them it does not occur to him to alter the amounts bequeathed to the others. Then he is asked: "What is to become of the residue?" and his answer is: "Divide that amongst the Mackie family." Now, the effect of these few words, in which he did not trouble himself to say anything as to the proportions, conditions, or method of division, was to create an entirely new disposition of the bulk of his property, and the conclusion that it was his desire to make this great change is only to be drawn from his having given this short answer to a question asked. Under the old will the various legatees, including the plaintiff, took amongst them substantially the whole of the testator's property as it then existed, and they shared the residue which, as early as 1878, had become considerable. Under the new will of 1888, which the testator desired should be the same as the old with the exception of adding a legacy to a Benevolent Society, the various specific legatees take, comparatively speaking, only a trifle, and substantially the whole of the property goes to the Mackies; and yet in the interview, to which Mr. Klingender deposes, the testator, when the Mackies' names and their specific legacies were read out, never suggested that he intended to give to them much more than before, or that as the residue was to go to them

they should be struck out from the list of persons whose legacies would diminish the residue. In fact, their specific legacies were struck out by the solicitor apparently without authority, and the testator made no comment on this when his will was read out to him. This alteration from his instructions was not purely formal, for it put Anthony Mackie on an equality with his sisters instead of giving him 200*l.* less as a specific legatee.

Now, from this and the other evidence to which I have referred, may not a jury infer, and reasonably infer, that the testator at this time very imperfectly understood what he was doing; that he had a very imperfect notion of the change that had taken place in the value of his property; of the complete *bouleversement* these instructions, if carried out, would make of the disposition of his property, and of his intentions under the will of 1870; that he had no sufficient appreciation of the result of his off-hand instruction, "Divide the residue amongst the Mackies." Is it not open to a jury to infer that he did not realise that this residue was at that time substantially the whole of his vast estate? It is also to be observed that throughout the interview of the 18th of May the testator appears to originate no proposal. His solicitor asks him certain questions, or does what is equivalent thereto, and to them the testator, it is stated, responded, and not a word about the enormous residue appears to have escaped him till, at the very close of the interview, Mr. Klingender asks: "What about the residue?" The next fact is that on 1st June Klingender attends the testator with the engrossment of the new will. He reads the operative portions of the will aloud, and apparently the testator makes no remark, but signs the will as engrossed. We think that there exists, in this case, substantial evidence from which a jury may reasonably infer that, when giving instructions for and when executing this will of 1888, the testator had no adequate notion of his property; of the effect of his intended or actual disposition of it; of the complete change that he was making in the dispositions under the will of 1870; of the value of his residuary estate, and consequently of the enormous disproportion between the benefit conferred upon the Mackie family and those conferred upon the other legatees under the will. This view is quite consistent with the jury's belief of Mr. Klingender's evidence.

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In one aspect the strongest evidence against the will is afforded by the narrative of the circumstances under which the instructions came to be given and the manner in which they were given and and acted upon. When the person apparently so indifferent as to the disposition of his large property is shown by all the evidence to have been suffering from bodily infirmity, and, according to much of the evidence, from mental infirmity, it is going further than we feel at liberty to go to declare that the jury were bound as reasonable men to support the will upon evidence of the testator's apparent intelligent understanding of other matters of business and of his capacity for ordinary conversation on the small personal topics which came under his notice. The value of this evidence in favour of the will must greatly depend upon the character of the witnesses who gave it, upon their powers of observation, upon their tendency to exaggerate or to speak accurately, points upon which the jury were in a better position to form a judgment than we can possibly be. We have not to determine that we should ourselves have come to the same conclusion as the majority of the jury, but before upsetting their verdict we should be sure that as reasonable men they ought not to have arrived at it. Looking at the strong evidence for and against the will, and the points of contradiction between witnesses who are in conflict, we cannot say that the jury were bound to find in favour of testamentary capacity. We dismiss the motion, with costs.

Solicitor for plaintiff: *D. H. Herald.*
Solicitors for defendants: *Klingender, Dickson & Kiddle.*

W. H. M.

IN RE FRANK BELL.

1892
Feb. 12, 25.

Hood, J.

Marine Act 1890 (*No.* 1165), *ss.* 177, 183, *sub-sec.* (2)—*Service of report on preliminary inquiry—Cancellation of certificate—Default in navigation—Gross misconduct—Evidence Act* 1890 (*No.* 1088), *s.* 53—*Statement by witness before Marine Court—Certiorari, ground for quashing proceedings upon.*

By sec. 177 of Act No. 1165, it is provided that no certificate shall be cancelled or suspended unless a copy of the report or of the preliminary inquiry or a statement of the case upon which the formal investigation is ordered, has been furnished to the owner of the certificate before the commencement of the formal investigation.

An investigation was held into the circumstances of a collision, at which B. was present as a witness, and to which he was a party, and at the investigation the representative of the Marine Board, in accordance with the rules, stated the questions upon which the opinion of the Marine Board was desired, and these questions were fully answered. A copy of these answers of the judgment of the Court was served upon B.

Held, that the service of the copy of the answers and the judgment of the Court was sufficient.

By sec. 183 of Act No. 1165, the Court of Marine Inquiry is authorised to hold formal investigations into charges of misconduct, and if the conduct is of a gross nature, the certificate may be cancelled or suspended.

Default in navigation may be gross misconduct within the meaning of sub-sec. 2 of sec. 183 of Act No. 1165.

A person charged, under sec. 183 of Act No. 1165, is a competent witness to give evidence on his own behalf.

Upon an investigation, under sec. 183 of Act No. 1165, the Court refused to allow B., a party to the proceedings, to be sworn as a witness and to give evidence on his own behalf, but permitted him to make a statement, which he did.

Held, the writ not being taken away by the Statute, and the proceedings appearing to be regular upon the face of them, that the refusal to swear B. as a witness was no more than an error or mistake, and did not take away the jurisdiction of the Court to adjudicate upon the investigation, and afforded no ground for quashing the proceedings upon *certiorari*.

THIS was a rule *nisi* for a writ of *certiorari* to bring up the proceedings of the Marine Court in connection with the suspension of the certificate of Captain F. Bell by the Court. The proceedings arose out of the circumstances attending the collision between the steamships "*Gambier*" and "*Easby.*" The facts, so far as they are material to this report, are fully stated in the judgment.

Box (with him *Woinarski*) to show cause.

Mitchell to move the rule absolute.

Cur. adv. vult.

HOOD, J. In the month of October last the Court of Marine Inquiry held a formal investigation, under the provisions of the

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Marine Act 1890, into a charge of misconduct that had been preferred against Frank Bell, formerly master of the ss. "*Gambier*." The finding of the Court was that the charge had been sustained, and that the misconduct amounted to gross misconduct, and Mr. Bell's certificate was suspended for nine months, and he was ordered to pay costs. Subsequently an order *nisi* was obtained by Mr. Bell, calling upon the said court and the members thereof to show cause why a writ of *certiorari* should not issue to remove their determination into this Court, with a view of quashing the same.

There are four grounds set out in the order *nisi*, but the first was abandoned at the argument. The others are as follow:—

"2. That no copy of the report, nor of the preliminary inquiry, nor of the statement of the case, upon which the said formal investigation into the said alleged charge was ordered, was furnished to the said Frank Bell, within the meaning of sec. 177 of the *Marine Act* 1890; the document served upon him, purporting to be a copy of the 'Report,' not being a copy of the 'Report' within the meaning of the said section."

"3 That the formal investigation having been merely directed to be held for the purpose of making an inquiry into a charge of misconduct in the navigation of the ss. '*Gambier*' against the said Frank Bell, that there was no jurisdiction in the said Marine Court to find the said Frank Bell guilty of 'gross misconduct' within the meaning of sec. 183 (2) A of the said *Marine Act* 1890; and that the mere default in navigation could not be 'gross misconduct' within the meaning of the said section."

"4. That the said Marine Court refused to allow the said Frank Bell to be sworn as a witness, and give evidence as a sworn witness on his own behalf."

The second ground is founded upon sec. 177 of the *Marine Act* 1890, which provides that no certificate shall be cancelled or suspended unless a copy of the report, or of the preliminary inquiry, or a statement of the case upon which the formal investigation is ordered, has been furnished to the owner of the certificate before the commencement of the formal investigation.

On this point the facts are that in September 1891 an investigation was held into the circumstances attending the collision between the steamship "*Easby*" and the ss. "*Gambier*," at which Mr. Bell was present as a witness, and to which he was a party; and at this investigation the representative of the Marine Board, in accordance with the rules, stated the questions upon which the opinion of the Court of Marine Inquiry was desired, and those questions were fully answered. A copy of these answers and of the judgment of the

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Court was served upon Mr. Bell, and it is contended on his behalf that this is not a compliance with the Statute. But whatever the original of this document may be called, it was the foundation of the case against Mr. Bell, and was all that was before the Board when the investigation was ordered. And if a copy of part of the notes of evidence given at an inquest be sufficient: *Exparte Ferguson* (*a*), I fail to see why this copy of the judgment and answers was not a compliance with sec. 177. The object of the section is to give the accused person notice of the charge about to be preferred against him, and this the document in question amply does. I think, therefore, that this objection cannot be sustained.

The third objection also in my opinion fails, as the finding of the Court seems to me to be directly covered by sec. 183 of the *Marine Act*. By that section, as I read it, the Court of Marine Inquiry is authorised to hold formal investigations into charges of misconduct, and then if the misconduct is of a gross nature, the certificate may be cancelled or suspended. This, I think, clearly gives the Court power to find a person guilty of gross misconduct, and default in navigation might or might not be gross misconduct according to the evidence.

There then remains the fourth ground. It appears that during the hearing of the case "the evidence of the said Frank Bell was tendered on his own behalf, and as evidence which should be taken, but the said court refused to allow the said Frank Bell to be sworn"; but "a statement was then made by the said Frank Bell, and such statement was taken down and subscribed by him." It is now contended that the Marine Court was wrong in refusing to allow Mr. Bell to be sworn. With this argument I am inclined to agree, because my present impression is that this case is not covered by sec. 53 of the *Evidence Act* 1890, and that therefore Mr. Bell would have been a competent witness. But it was conceded in argument that this order ought not to be made absolute, if upon the return of the writ of *certiorari* the proceedings would not be quashed; and, therefore, assuming that this objection is valid, it becomes necessary to consider how far it affords any ground for quashing proceedings upon *certiorari*, the proceedings themselves being regular upon their face, and the objection only

(*a*) L.R. 6 Q.B., p. 287.

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appearing by affidavit. As there is no statutory provision preventing the removal by *certiorari* of the decisions of this Marine Court, Mr. Bell has his common law rights, that is, the right of every suitor to appeal to this Court to keep the court of inferior jurisdiction within the limits of its authority: See *Re Sullivan* (*b*). But it is a general rule that this Court will not on *certiorari* notice objections (except for want of jurisdiction) raised upon affidavit and not appearing on the face of the proceedings: *Stone*, 118; *Reg.* v. *Cambridgeshire* (*c*); for a *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction has exceeded its bounds: *Rex* v. *Morley* (*d*). And when the Legislature has trusted the original (or it may be as here the final) jurisdiction on the merits to the Court below, all that this Court can do is to see that the case was one within the jurisdiction, and that the proceedings on the face of them are regular and according to law: *Reg.* v. *Bolton* (*e*). The objection, therefore, if raised on affidavit, must go to the jurisdiction. Mere error or mistake will not be sufficient. Thus, misdirection is no ground for *certiorari*: *Reg.* v. *Christian* (*f*); *Reg.* v. *Ingham* (*g*); *Reg.* v. *Steward* (*h*); nor is the fact that a coroner has received unsworn statements: *Reg.* v. *Ingham*. There must be something disclosed that destroys the power of the inferior court to make the order complained of before this Court will interfere on *certiorari*. And as the only effect of the statutory privative provisions with respect to *certiorari* is to prevent objections to technical defects appearing on the face of the proceedings, *Reg.* v. *Chantrell* (*i*)—leaving untouched the power of this Court to interfere in cases of manifest want of jurisdiction, or manifest fraud—it follows that where *certiorari* is not taken away by Statute, and where the proceedings are regular on their face, the power of this Court only extends to ascertaining whether the tribunal had jurisdiction, assuming the facts alleged in the information to be true: *Reg.* v. *Bolton*. In the present case Mr. Bell was heard in his defence through his solicitor, and made his statement; the court was a competent tribunal having jurisdiction over

(*b*) 22 L.R. (Ir.) Q.B. 119.
(*c*) 4 Ad. & El. 111.
(*d*) 2 Burr. 1042.
(*e*) 1 Q.B. 66.
(*f*) 12 L.J. M.C. 26.
(*g*) 5 B. & S. 257.
(*h*) 9 Q.B.D., at p. 743.
(*i*) L.R. 10 Q.B., at p. 589.

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the subject matter of the inquiry; all conditions precedent had, in my opinion, been complied with; and no facts were proved during the hearing that could prevent the court from making, upon sufficient evidence, the order which it did make, so there was therefore no want of jurisdiction upon which to found *certiorari*: *Colonial Bank* v. *Willan* (*k*). The refusal to swear Mr. Bell as a witness was no more, in my opinion, than an error or mistake, and, as has been frequently pointed out, an error or mistake does not necessarily take away jurisdiction. As therefore I think none of the grounds of this order have been sustained it will be discharged with costs. I have not formed any definite opinion upon the other point raised in opposition to this order, viz., that it is a matter of discretion with this Court to issue *certiorari*; but, if there is any discretion, I would not exercise it in Mr. Bell's favour, inasmuch as the objections raised, even if well founded, do not show that Mr. Bell has, or could have, suffered the slightest injustice from them (*l*).

Solicitor for Marine Board: *Guinness*, Crown Solicitor.

Solicitors for applicant: *Gillott, Croker & Snowden.*

W. H. M.

[IN CHAMBERS.]

1892

March 21.

Holroyd, J.

TUNSTALL BRICK AND POTTERY COMPANY *v.* MERCANTILE BANK OF AUSTRALIA LIMITED.

Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6—*Order XIV., rr.* 1, 2—*Specially endorsed writ—Application for final judgment—Service of exhibits referred to in affidavit—Demand of debt before action.*

In an application for final judgment under Order XIV., r. 1, copies of the exhibits referred to in an affidavit in support of the application should be served on the defendant; but the fact of non-service of such copies is an irregularity only, and may be cured by granting an adjournment for the purpose of enabling the plaintiff to serve them.

A writ containing a manifest blunder in it, but otherwise specially endorsed, does not lose its character of being specially endorsed by reason of such blunder.

In an action by a customer against a bank for payment of a current account, no previous demand for payment is necessary before action, but the writ itself is a sufficient demand.

THIS was an application on behalf of the plaintiff for leave to sign final judgment under Order XIV., r. 1. The defendant did

(*k*) L.R. 4 P.C. 417.

(*l*) This judgment, so far as regards the fourth ground of objection, was reversed on appeal by the Full Court: See *In re Bell, post.*—ED.

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not file any affidavit. The facts material to this report are set out in the judgment.

Mitchell to oppose—There are two preliminary objections to this application. The defendant has not been served with copies of the exhibits referred to in the plaintiff's affidavit in support of the application; this is requisite under the provisions of Order XIV., r. 2. The writ is not specially endorsed. The particulars are inaccurate, and the writ without the particulars is not a specially endorsed writ: *Perry* v. *Flint* (*a*); *Windsor Coffee Palace* v. *Cheel* (*b*). The defendant appeared to the writ as originally served, and if such writ was not then specially endorsed, it cannot now be amended for the purpose of enabling the plaintiff to apply for judgment under Order XIV., r. 1: *Gurney* v. *Small* (*c*). The plaintiff does not show that any demand was made for payment, and the defendant is certainly entitled to have some notice that payment is required before he is attacked by action.

Madden in support of the application—The non-service of the exhibits is a mere irregularity, and if the defendant requires an adjournment, it may be granted so as to enable the plaintiff to serve the exhibits: *Edgecumbe* v. *Taylor* (*d*); *Leake* v. *Field* (*e*). The defendant in this case cannot be prejudiced, for the exhibits referred to are the ledger accounts, and the pay-in slips and the affidavit intimate, as the fact really is, that the documents referred to are in the defendant's possession. The plaintiff has power to amend his endorsement once without leave: Order XXVIII., r. 2. The plaintiff amended under this rule, and as the defendant appeared after it was served with the amended claim, it must be taken to have appeared to the endorsement as amended. No demand was necessary; a debtor when the debt is due is bound to pay without any demand, and in any case the writ itself is a demand.

Cur. adv. vult.

HOLROYD, J. This is a summons for final judgment under Order XIV., r. 1. The defendant bank did not file any affidavit in

(*a*) 9 A.L.T. 99.
(*b*) 15 V.L.R. 279.
(*c*) 1891, 2 Q.B. 584.
(*d*) 8 A.L.T. 14.
(*e*) 15 V.L.R. 352.

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reply, but counsel took several preliminary objections. The first objection was that copies of the exhibits referred to in the affidavit filed on behalf of the plaintiff company had not been served on the defendant bank together with the affidavit.

The plaintiff company sues the defendant bank for money deposited with the defendant as banker, and for amount due on current account. The exhibits referred to in the affidavit were the plaintiff's bank pass-book and a book containing the blocks of the pay-in slips. The ledger from which this bank pass-book was made out, or ought to have been made out, and the actual pay-in slips are in the possession of the defendant. The fact that copies of these exhibits were not served upon the defendant, together with the affidavit, would, in my opinion, be a ground for adjournment if the defendant were in any way prejudiced by the omission, and it is possible that the defendant might be prejudiced by the omission to serve copies of the bank pass-book, inasmuch as the plaintiff relies upon the bank pass-book as evidence of the amount of payments made by the defendant on account to the plaintiff out of the money paid in by the plaintiff. If the defendant, therefore, requires an adjournment for the purpose of obtaining this affidavit, I should grant it, but the non-service of copies of these exhibits was an irregularity, in my opinion, and can be cured, and is not fatal to the application.

Another objection was that the writ of summons had been amended, and that the defendant had not been served with a copy of the amended writ, and therefore that there was no foundation for this proceeding as upon the amended writ. I cannot discover from the affidavits that the writ of summons has been amended at all. What was done was this—a paper purporting to contain an amended statement of claim as endorsed on the writ was served on the defendant's solicitor on the 15th March last. The writ itself had been served previously, and the defendant appeared to the writ on the 16th of March. The statement of claim endorsed on the writ was as follows:—"The plaintiff's claim is for money deposited with the defendant as banker. Particulars—9th March, 1892—To amount of account current due by plaintiff to defendant on this date, 284*l.* 19*s.* 10*d.*" In the document furnished to the defendant's solicitor on the 15th March, the

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particulars had been altered by substituting the word defendant for "plaintiff" and the word plaintiff for "defendant," so that the particulars run—"9th March, 1892—To amount of account current due by defendant to plaintiff on this date, 234*l.* 19*s.* 10*d.*" The defendant has appeared to the writ, and the writ was a specially endorsed writ. The particulars, if they had stopped at the word "due" and had only added the amount, would have been perfectly clear, correct, and intelligible. The words, "by plaintiff to defendant on this date," make nonsense of the particulars and represent a thing impossible, and were a manifest blunder. That blunder did not, in my opinion, alter the character of the writ, and I think that blunder might have been subsequently amended, though it has not been amended up to the present. I am inclined to think that I could amend it now. It would hurt no one, and would not alter the manifest sense of the statement of claim. Whether or not, however, it could be amended immediately, is, I think, really not material, for the meaning is so perfectly intelligible that I think the plaintiff, having proved his case by his affidavit, is entitled to judgment for the amount endorsed on the writ.

The third objection raised was that the defendant bank was sued without any previous demand having been made for the money by the presentment of a cheque. The answer to this is that the writ itself is a good demand. At the same time it seems to me that there is more justice in this than in either of the other two objections, because the plaintiff, by adopting this form of proceeding without having made any previous demand for the money, puts the defendant (if he intends to proceed with the action) to the necessity of paying the costs of the writ. I do not know whether the defendant requires an adjournment. If it does not, I will order judgment for the plaintiff for the amount claimed. [Defendant's counsel having intimated that he would like an adjournment, His Honor continued]—I will give the plaintiff twenty-four hours to serve copies of the exhibits, and I will adjourn the case for two days after service of such copies.

Solicitor for plaintiff: *W. H. Lewis.*
Solicitors for defendant: *Davies, Price & Wighton.*

W. H. M.

[IN CHAMBERS.]

MOORE *v.* RUSSELL.

1892
March 22.

Holroyd, J.

Practice—Writ specially endorsed—Application for judgment—Amendment of endorsement after summons taken out—Rules of the Supreme Court 1884—*Order III., r.* 6—*Order XIV., r.* 1.

In order to entitle a plaintiff to enter final judgment under Order XIV., r. 1, the writ of summons must be a good specially endorsed writ under Order III., r. 6, at the time when the defendant entered his appearance.

In an application under Order XIV., r. 1, where the writ is not specially endorsed at the time of the defendant entering an appearance, the Court has no power to amend the writ for the purpose of enabling the plaintiff to take advantage of the provisions of Order XIV., r. 1.

THIS was an application on behalf of the plaintiff for leave to sign final judgment under Order XIV., r. 1. The writ was endorsed with a claim for interest, and was in the following form:—

"Statement of Claim.—The plaintiff's claim is for 425*l.* 3*s.* 2*d.*, for moneys paid for and on behalf of the defendant, and interest thereon, being amount of defendant's proportionate share under and by virtue of two several guarantees dated respectively 8th August 1889 and 4th February 1890, given by the plaintiff and the defendant together with others to the English, Scottish, and Australian Chartered Bank. Particulars:—

Oct., 1891—To defendant's proportionate share of amount paid to Messrs. Moule and Seddon, as solicitors for the English, Scottish, and Australian Chartered Bank, on joint and several guarantees of 8th Aug. 1889 and 4th Feb. 1890	416*l.*	16*s.*	10*d.*
„ Interest thereon at 8 per cent. to 29th Feb. 1891	8*l.*	6*s.*	4*d.*
	425*l.*	3*s.*	2*d.*"

Hayes to oppose—There is a preliminary objection to this application being heard. The writ is not specially endorsed, inasmuch as it contains a claim for interest, and it does not appear that such interest arises out of any contract express or implied: *Coane* v. *Thomas Bent Land Company* (*a*).

Skinner in support of the application—The Court has power to amend the claim, and the interest may be struck out and judgment given for the principal sum merely. I now apply under Order XXVIII., r. 2, that the claim be thus amended.

(*a*) 17 V.L.R. 198.

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Hayes—The writ cannot now be amended for the purpose of being used in an application for final judgment; the writ must be specially endorsed at the time the appearance was entered: *Small* v. *Gurney* (*b*).

HOLROYD, J. I think that Mr. Hayes is right in his interpretation of the rule under which this application is made. I cannot now order this writ to be amended for the purpose of enabling the plaintiff to apply for final judgment under Order XIV., r. 1. The rule provides that "where the defendant appears to a writ of summons specially endorsed," the plaintiff may apply for final judgment. In this case the writ was not specially endorsed at the time when the defendant entered his appearance, and therefore the plaintiff cannot now apply under Order XIV., r. 1. In the case of *Tunstall Brick and Pottery Co.* v. *Mercantile Bank* (*c*), I held that a writ with a manifest blunder in it, but being otherwise specially endorsed, did not lose its character by reason of the blunder. In this case, however, the writ was never specially endorsed. I dismiss the application without costs.

Summons dismissed.

Solicitor for plaintiff: *F. S. Stephen, jun.*
Solicitor for defendant: *Waxman.*

W. H. M.

(*b*) 1891, 2 Q.B. 584.

(*c*) *Ante*, p. 59.

CAHILL *v.* CAHILL.

F.C.

1892
March 24.

Practice—"Rules of Supreme Court 1884"*—Order LIV., r. 24—Appeal from Chambers—Time.*

Notice of motion, by way of appeal from a decision of a judge in Chambers, must be made within eight days after the decision appealed against.

THIS was an appeal by way of motion from a decision of Holroyd, J., in Chambers, ordering the plaintiff's statement of claim to be struck out on the ground that it disclosed no cause of action. The judgment appealed against was delivered on the 10th March; the notice of motion was served on the 18th March for hearing on the 24th March.

Fisher in support of the motion.

Duffy to oppose—There is a preliminary objection to the hearing of this appeal. By Order LIV., r. 24, it is provided that an appeal from the decision of a judge in Chambers must be made within eight days after the decision appealed against. By Order LII., r. 5, the motion must be served two clear days before the hearing, and it was necessary to serve it before the 18th March, so that the service was too late, and the motion is not made within eight days: *Steedman* v. *Hakim* (*a*); *Worne* v. *Berger* (*b*).

Fisher—The motion is served within the eight days, and as the practice is to list all motions it is practically impossible for the motion to be made within eight days.

PER CURIAM [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. The motion is clearly made too late, and does not comply with the provisions of Order LIV., r. 24, and it must be dismissed with costs.

Motion dismissed with costs.

Solicitor for appellant: *Windsor.*

Solicitors for respondent: *Casey & O'Halloran.*

W. H. M.

(*a*) 22 Q.B.D. 16.

(*b*) 17 V.L.R. 107.

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March 24.

Holroyd, J.

[IN CHAMBERS.]

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED *v.* WHITE AND OTHERS.

Practice—Rules of the Supreme Court 1884—*Order XVI., r.* 48—*Third party, application for leave to join.*

An application by the defendant for leave to bring in a third party should be made upon notice to the plaintiff, and not *exparte*.

THIS was an application on behalf of the defendant for leave to bring in a third party to the action. The application was made *exparte*.

Hayes in support of the application.

[HOLROYD, J. Should not the plaintiff have notice of this application?]

The general practice has been to make the application *exparte*. No injustice can be done to the plaintiff, and he cannot be hurt in any way, because the judge may, upon subsequent applications under Order XVI., give direction as to the conduct of the action so as not to prejudice the plaintiff. The joinder of a third party is allowed as of course upon sufficient grounds being shown.

HOLROYD, J. In the case of *Wye Valley Railway Company* v. *Hawes* (*a*), upon a similar application, Hall, V.C., at p. 491, says:—"Though I can make the order asked for, I should prefer in this case that notice be given to the plaintiffs. I may say further that I should be unwilling to give the leave asked for in any case without notice being given to the plaintiffs of the granting of that which might interfere with their action in a very material way. Convenience is all in favour of hearing what the plaintiffs have to say in the first instance, instead of waiting to have the difficulties raised and discussed on a subsequent application. My opinion is that notice should be given in every case." I think that that is an excellent practice to follow, and would not cause any inconvenience. A summons should be taken out and served on the plaintiff.

Solicitor for defendants: *Woolcott*.

W. H. M.

(*a*) 16 Ch. D. 489.

F.C.

1892
March 25.

GALBALLY *v.* WATKINS.

Marriage Act* 1890 (*No.* 1116), *s.* 48—*Illegitimate child—Corroboration of mother's oath—Evidence.

In a complaint for the maintenance of an illegitimate child, evidence given by the complainant and the defendant that the defendant was the father of a former child of the complainant is admissible, and is a corroboration of the mother's oath within the meaning of sec. 48 of Act No. 1166.

SPECIAL CASE stated by the chairman of General Sessions in obedience to a writ of mandamus.

The following were the facts stated:—On the 6th November the justices of North Melbourne made an order against Charles Galbally directing him to pay 10*s.* a week for the support of an illegitimate child, of which M. Watkins, the complainant, was the mother. Against this order Galbally appealed to General Sessions. The respondent gave evidence that the appellant was the father of the child which was born on the 7th November 1889. She also gave evidence that she had previously had a child by the appellant, born on the 6th November 1888, and which lived only three weeks and three days, and that the appellant had made arrangements for, and paid for, the burial of that child. About a fortnight after the birth of the first child the appellant came to the house where she was staying and slept in the same bed with her, and about a week after the death of the child he came to her again, and then came regularly until March of the following year. The appellant, called by the respondent's counsel, gave evidence that he was the father of the first child, and had paid the expenses of the burial, but he denied that he was the father of the second child. He also gave evidence as follows:—"In October 1888 I visited her at Mrs. Miller's. I visited her for about a month; this was before the death of the first child. After the death I do not know where she lived. I never visited her after the death of the first child. Between then and March 1889 I saw her only once, at the Prahran railway station." In answer to questions relating to evidence given by him at the Court of Petty Sessions, he said:—"I swore that I had intercourse with her up to the death of the child. I had no intercourse after the death of the first child. Between March and November 1889 I had no connection with her."

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It was contended on behalf of the respondent, on the authority of *Cole* v. *Manning* (*a*), that the respondent having had a child by the appellant was sufficient corroborative evidence of the mother's oath; while for the appellant it was argued that the evidence ought not to have been admitted, and was not in any way corroborative of the mother as to the paternity of the child. The chairman, in a considered judgment, dismissed the appeal, and affirmed the order of the justices. The chairman, in stating the case, desired to say that the reason why he had not stated a case until compelled so to do by mandamus was that he had not been asked to state a case until after the adjournment of the sessions, and he refused the application, as he considered that he had no jurisdiction. The questions for the opinion of the Court were—Was the evidence respecting the first child properly received, and ought it to have been taken into consideration as corroborative evidence of the mother? (2) Was the other evidence, set forth, of the appellant properly taken into consideration as corroborative?

Power to move the rule absolute.

There was no appearance to show cause.

Power—The evidence was inadmissible, and certainly cannot be said to be corroborative as to the paternity of the child. The case of *Cole* v. *Manning* (*a*) was decided under the English Act 7 and 8 Vict., c. 101, sec. 3, which is different from our legislation. By sec. 48 of the *Marriage Act* 1890 there must first be the mother's oath, and then there must be other facts from which the Court can reasonably infer that the person charged is the father of the child.

[HOOD, J. Under the English Act the mother's evidence must be corroborated in some material particulars, but in our Act there is merely a negative statement that "no man shall be taken to be the father of an illegitimate child on the oath of the mother alone."]

The evidence here merely lends some probability to the mother's statement.

(*a*) 2 Q.B.D. 611.

[HIGINBOTHAM, C.J. If there is any evidence relative to the fact of paternity it would be sufficient under our Act.]

There is no evidence other than the mother's from which the justices could draw any inference of that fact.

Counsel referred to *Phillip* v. *Tomlinson* (*b*).

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.] This mandamus should never have gone, and if the learned judge who granted it had been in possession of the facts that he ought to have been in possession of, namely, that the application to state a case had not been made at the time when the appeal was heard, it never would have gone. The learned chairman of General Sessions has expressed his reasons for not stating a case. The return to the rule, however, having been made, we are of opinion that the learned chairman was quite correct in his decision, and was right in admitting the evidence; that evidence was relative to the question he had to decide, and was corroborative of the mother's evidence. The question will be answered in the affirmative, and the rule will be discharged.

Rule discharged.

Solicitors for the appellant: *Gaunson & Wallace.*

W. H. M.

(*b*) 2 W.W. & A'B. (L.) 92.

1892
March 30.

Holroyd, J.

[IN CHAMBERS.]

DOUGHTY AND OTHERS *v.* COUNSEL AND OTHERS.

Practice—Rules of Supreme Court 1884—*Order XII., r.* 8—*Order XIV., r.* 1—*Appearance—Application for final judgment.*

In an application under Order XIV., r. 1, for final judgment, in order to prove appearance on the part of the defendant, it is sufficient to produce the duplicate memorandum of appearance, sealed with the seal of the Court, although the fact of appearance is not alleged in the plaintiff's affidavit in support of the application.

McNamara v. *Clarton* (17 V.L.R. 24) distinguished.

THIS was an application on behalf of the plaintiffs for leave to sign final judgment under Order XIV., r. 1.

Piggott to oppose—There is a preliminary objection to this application. It is not stated in the affidavit that any appearance has been entered by the defendants, and therefore the application should be dismissed: *McNamara* v. *Clarton* (*a*).

The Solicitor for the plaintiff in support of the application produced the duplicate memorandum of appearance.

HOLROYD, J. I held in the case of *Bank of Van Diemen's Land* v. *Ivey* (*b*) that the production of the duplicate memorandum of appearance was sufficient to satisfy the Court that the defendant had appeared, and the defendant cannot want any evidence of that fact himself. I was not referred to the case of *McNamara* v. *Clarton* when deciding the point previously, but in that case it does not seem to have occurred to any one to tender the duplicate memorandum of appearance, and the provisions of Order XII., r. 8, appear to have been overlooked. I think the production of this duplicate memorandum is sufficient, and I overrule the objection.

Solicitors for plaintiffs: *Fox & Overend.*
Solicitor for defendants: *Jamieson.*

W. H. M.

(*a*) 17 V.L.R. 24.

(*b*) 13 A.L.T. 180.

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March 14, 31.

Quo warranto—Officers in Public Service—Act No. 160, *s.* 21—"*The Public Service Act* 1883" (*No.* 773), *s.* 2—*Rights and privileges—Public Service Act* 1890 (*No.* 1133), *s.* 2—*Promotion.*

Sec. 2 of Act No. 773 does not preserve any right to officers classified under Act No. 160 so as to entitle them to priority of promotion as against officers classified in the same class for the first time under Act No. 773.

QUO WARRANTO.

This was an application for an information in the nature of a writ of *quo warranto*, seeking to oust the respondent, Kendall, from his position as an officer in the fourth class of the Public Service.

The relator, Edgar T. Owen, entered the Public Service in 1877, when the Act No. 160 was in force, and in December 1881 he was classified as a fifth class officer under the provisions of that Act. The relator continued to be a classified officer in the fifth class up till the coming into operation of the Act No. 773 in 1883. In 1885 he was classified under the provisions of Act No. 773 as of the fifth class of the clerical division of the Public Service and continued so classified ever since. Since such classification a vacancy occurred in the fourth class of the clerical division of the Public Service, and such vacancy was filled up in 1890 by the appointment of the respondent, Kendall, by the Governor in Council. The respondent, Kendall, had never been classified under the provisions or within the meaning of the Act No. 160.

The grounds on which the rule *nisi* was granted were:—(1) That at the time the said Kendall was promoted from the fifth class of the said clerical division of the Public Civil Service, and took upon himself the said office, there were also in the said fifth class of the said clerical division of the said Public Civil Service divers persons who had been duly classified in the Public Civil Service of Victoria within the meaning and under the provisions of the Act of the Parliament of Victoria No. 160, and of the Act of Parliament of Victoria No. 773, and of the Act of Parliament of Victoria No. 1133, of whom the said Edgar T. Owen was one, and who were therefore entitled to have been promoted to the said fourth class of the said clerical division of the Public Civil Service

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of Victoria under the provisions of the said Act No. 773, and the the said Act No. 1133, in priority to the said Kendall, who had never been classified, as aforesaid, under the provisions or within the meaning of the said Act No. 160. The respondent filed an affidavit setting out various facts which are not material to this report. There were eight other cases of the same character as the present, but the case of the relator v. *Kendall* was taken as the test case, and arguments were heard in the one case.

Box and *Higgins*, for the respondent Kendall, to show cause—By sec. 21 of Act No. 160 it is provided that when in the ordinary division of the Public Service any vacancy occurs in a superior class, the Governor shall promote the most deserving officer from the class next below that in which the vacancy has occurred. The office from which it is sought to oust the respondent was created by Act No. 773, and the relator can have no "right or privilege" saved to him to obtain entrance to an office which was not in existence under Act No. 160. All that sec. 2 of Act No. 773 preserves is the rights and privileges existing at the passing of Act No. 773, or hereafter accruing to all persons subject to the provisions of Act No. 160. This right is one which is created by Act No. 773. The case of *Brown v. The Queen* (*a*) does not meet this case, for there it was decided that the plaintiff had a distinct right conferred upon him to be tried by a particular tribunal, and that that right was preserved by sec. 2 of Act No. 773. Under Act No. 773 an entirely new classification of the Public Service was created, and the old classification was swept away. The old office to which the relator might have been entitled has gone. The rights and privileges now asserted by the relator are those appertaining to a class, and not to an individual, and the section merely preserves the rights of individuals. He has not sufficient interest to enable him to obtain this writ; his only right would be to a "chance" of getting this promotion; he does not assert an absolute right to it at the present time.

Madden, for the relator, to move the rule absolute—The relator had a right at the passing of Act No. 773 to a certain system of

(*a*) 12 V.L.R. 397.

promotion under Act No. 160; he was classified subject to that right, and it has not been taken away by Act. No. 773. It was a very important right, and one which was of great value to an officer, and he would be content to take a lower salary in consideration of such right. The classification under Act No. 773 has merely changed the names; it is practically the same as the old classification. By Act No. 773 new persons have been added to the old class to which the relator belonged. Persons who had never hitherto been classified at all were put into the fifth class, and if the relator has to compete with all these new officers, he has been deprived of a very valuable privilege or right. The Legislature does not give compensation, but it preserved rights. In *Brown* v. *The Queen* (*b*), where a perfectly general section was the subject of consideration, it was held that, notwithstanding the generality of the section, the provisions of sec. 2 of Act No. 773 applied, and the applicant's right was preserved.

Cur. adv. vult.

HIGINBOTHAM, C.J. The first only of these cases has been argued. It was agreed that all the other cases involve the same question, and will be governed by our decision in the first case.

This is a rule *nisi* calling on Joseph Kendall to show cause to the Full Court, to which the matter has been referred, why an information in the nature of a writ of *quo warranto* should not be exhibited against him to show by what authority he claims to exercise the office of a clerk in the fourth class of the clerical division of the Public Civil Service of Victoria. The ground of this rule is stated to be that at the time Joseph Kendall was promoted from the fifth class of the clerical division, and took upon himself the office of a clerk in the fourth class, there were also in the fifth class of the clerical division divers persons who had been duly classified within the meaning and under the provisions of the Act No. 160, and of the Act No. 773, and of the Act No. 1133, of whom the relator, Edgar Theodore Owen, was one, and who were therefore entitled to be promoted to the fourth class of the clerical division of the Public Civil Service of Victoria, under the provisions of the

(*b*) 12 V.L.R. 397.

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Act No. 773 and the Act No. 1133, in priority to the said Joseph Kendall, who had never been classified under the provisions or within the meaning of the Act No. 160.

This claim of the relator is founded upon sec. 2 of the Act No. 773, "*The Public Service Act* 1883," as interpreted and applied by this Court in the case of *Browne* v. *The Queen* (c). Sec. 2 is in the following terms:—

"From and after the passing of this Act, the Act No. 160, being an Act to regulate the Civil Service, shall be and is hereby repealed, save and except as to all matters and things done under and to all the privileges and rights now existing or hereafter accruing of all persons now subject to the provisions of that Act, and all such persons shall in every other respect be subject to the provisions of this Act in the same way and to the same extent as if they had been appointed after the passing hereof, save and except as to being required to pass an examination."

The claim of the relator expressly sets up a title in himself, and in all other persons in the fifth class of the clerical division, to the rights of promotion existing under both the Acts No. 160 and No. 773. It was admitted in argument that the relator's claim amounted to this, that he and all other officers in the fifth class of the clerical division, whose rights as classified officers under Act No. 160 were preserved by sec. 2 of Act No. 773, were entitled to be promoted into the fourth class in priority to all other officers in the fifth class who had had no right of promotion under the Act No. 160 so preserved to them. The same title of promotion, if it exists, would extend to the same class of officers throughout the higher ranks of the Public Service.

The claim as it is thus presented is, in my opinion, unfounded, and a wholly inadmissible claim. It might be less untenable, although I do not think that it would then be a good claim, if it asserted a right on behalf of all officers classified under Act No. 160 to be treated as a continuing, separate, and independent branch of the Public Service, with the professional division and the ordinary division with its five classes preserved for their separate benefit, and having the right to be promoted in such divisions and classes by a different authority, and on different grounds from all other officers in the Public Service coming within the Act No. 773, but without any rights under Act No. 160. Such a claim could not be held, in my opinion, to be consistent with the general scope and

(c) 12 V.L.R. 397.

with many of the express provisions of the Act No. 773, but it would not be self contradictory, as the relator's claim, in the form in which he now puts it, appears to me to be; for he claims at once the right to be classified with all other officers of the Public Service under the Act No. 773, and to have the rights of promotion accruing to him under that classification, while at the same time he insists that he and others possessing similar preserved rights should be promoted by an authority acting under different conditions (*i.e.*, the Governor in Council alone, and not the Governor in Council acting on the recommendation of the Public Service Board) and upon a different ground (*i.e.*, desert, to be judged of by the Governor in Council, and not seniority and merit combined) from those by which the promotion of fellow officers in the same division and class is to be determined. The right claimed by the relator, therefore, is not only opposed to the rights of other officers in the same class granted by the Legislature to all officers alike, but it is inconsistent with the right he claims for himself, for there is no power to promote an officer to a higher class in the clerical division except in the mode and upon the terms provided by the Act No. 773, and these the relator refuses to accept. As the relator has not presented his claim under the Act No. 160, standing alone and apart from the Act No. 773, I have not thought it necessary to consider whether his claim is one that could be supported as a legal right under the first-mentioned Act alone, and I express no opinion as to whether, if that Act alone were still in force, an objection by the officers in any class of the ordinary division to the promotion in priority to them of any officers classified in the same division and class who had been admitted under a different examination, or without examination, could be sustained.

The system of classification of the Civil Service under Act No. 160, and of the Public Service under Act No. 773, though they have some features in common, are entirely distinct and independent systems. The later Act was designed to include departments of the Public Service not provided for by the earlier Act. A much larger number of persons employed in the Public Service are classified under it than were included in the classification under the first Act. The rules for the appointment and promotion of officers and the regulation of the Service under Act 773 are in many

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respects different. It is impossible, therefore, in cases where competing claims of officers, all of whom are under the new system, have to be considered and determined, to apply to a portion of those officers the rules which govern the rights of that portion under the older system. I think that it was the clear intention of the Legislature that the system of promotion under Act No. 773 is to apply to all classified officers in the Public Service, including the relator and those who held a similar position under the Act No. 160, in accordance with the rules of promotion laid down by the Act No. 773. This determines, in my opinion, the question we are now considering, and shows that the right of prior promotion claimed by the relator is not one of the rights preserved by sec. 2 of Act No. 773. A saving clause in an Act of Parliament, which is repugnant to the body of the Act, is void: *Per* Lord Coke in the case of *Alton Woods* (*d*), cited and followed in the *Corporation of Yarmouth* v. *Simmons* (*e*), where Fry, J., on p. 527 observes:—

"I think that when the Legislature clearly and distinctly authorises the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone because the thing cannot be done without abrogating the right."

It has been contended that this question has been already decided in effect by this Court in *Browne* v. *The Queen* (*f*). If that be so, we could not, in accordance with our practice, go behind and review that decision in the Full Court constituted as this Court is now constituted. I was a member of the Full Court which decided that case. I dissented from the judgment of the Court, but I am, of course, bound by it, although I am not bound by all the reasons assigned for, but not essential to, the decision. The single point determined in *Browne* v. *The Queen* (*f*) was that officers of the Public Service appointed under Act No. 160 are not affected by sec. 76 of "*The Public Service Act* 1883," which gives power to the Public Service Board, with the consent of the Governor in Council, to reduce the number of officers in any department, or to dispense with the services of any officers, and that the modes and causes for dispensing with the services of such officers are still governed by sec. 27 of the Act No. 160, which reserves power to the Governor in Council to dispense with the services of any officers

(*d*) 1 Co. Rep. 40 B. (*e*) 10 Ch. D. 518.
(*f*) 12 V.L.R. 397.

for either of the reasons therein stated. There is a marked difference between the right claimed and allowed by the Court in that case and the right claimed in the present case. The right allowed by the Court in *Browne* v. *The Queen* (*g*) only affected the class of officers to whom the right was held to belong. The allowance of that right did not interfere with the rights of other officers who were classified for the first time under "*The Public Service Act* 1883." But the right now claimed by the relator, if it should be allowed, would postpone and thereby affect very injuriously the rights of promotion of officers outside the protected class, and it would thus clearly contravene the rules of promotion which the Legislature intended to apply to all officers alike who should be classified under the later Act. I am of opinion, for these reasons, that the rule in each of these cases should be discharged, and with costs.

WILLIAMS, J. I have had the opportunity of reading the judgments in this case, and I agree in the judgment of the Court, but prefer to concur in the reasons stated by Hood, J.

HOOD, J. The relator in these cases alleges that he had certain rights of promotion under Act No. 160, which were preserved to him by sec. 2 of Act No. 773, and that these rights have been infringed. It is necessary, therefore, to understand clearly what those rights really were. By sec. 21 of Act No. 160 it was provided that—

"When in the ordinary division any vacancy occurs in any superior class, if it be expedient to fill up such vacancy, the Governor in Council, except as hereinafter provided, shall promote from the class next below that in which the vacancy has occurred such officer as he shall judge the most deserving of such promotion."

That is the right which that Statute gave to officers with regard to promotion. Vacancies in a class (with certain exceptions not here material) are to be filled from the class next below it. That is to say, the officers in the fifth class have the first claim to promotion to the fourth, and so on in each class. There is to be no skipping of any class in favour of the members of a class below it. The real intention of the Legislature is plain. It was to ensure to the

(*g*) 12 V.L.R. 397.

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Public Service a regular system of gradation, so that (unless in certain exceptional circumstances) no member of that service could find that his classified junior was promoted over his head, and each civil servant was, in respect to promotion, to be brought into competition with the members of his own class only. If this be all the relator's rights, they have been preserved to him by sec. 2 of No. 773, but on the facts of these cases they have not been infringed. He, however, contends that his rights are far more extensive. He says that his right is not only that competition should be limited to the members of his own class, but that such competition must be confined to those members of his class who have entered it in the same way as he did, viz., by examination. I cannot find in the Statute any trace of such an extended right. It is true that Act No. 160 provided for examinations as a test for entrance to the Civil Service, but I do not see that this has anything to do with the right of promotion in sec. 21. If the relator's contention were correct, it would follow that the standard of the entrance examinations could not be altered without infringing the rights of every member of the whole Civil Service. This view would also lead to the conclusion that sec. 2 of No. 773, which purports merely to save existing rights, did really create them. For under No. 160, even on the relator's view, there would be new men, entering the service continually by examination, who would be in competition with him. But as now no more can enter in that way he would be free from competition, except from those who were in the service when No. 773 was passed. In course of time, then, as those men are moved on by promotion or death, his chance of promotion increases until, if he survives, his right becomes an absolute one. In point of fact, it was boldly put in argument that the effect of sec. 2 of No. 773 was to create a close corporation consisting of the then members of the various classes; that those members constituted in each class a body having preferent rights to promotion against all new comers; and that, until every member of such class had been promoted, no new appointments could be made in any higher class. I cannot believe that such a state of things was ever intended, and it is not, in my opinion, anywhere expressed. The result of sec. 21 of No. 160 was to tie the hands of the Governor in Council, and so limit the choice for promotion in cases

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of vacancies to the members of a particular class. While the section does this much, it does not confer any right upon the members of any class to complain when the Legislature sees fit to alter the mode of admission to that class. The saving clause in No. 778, at the utmost, can only tie the hands of the Governor in Council as they were tied before, by limiting him in filling vacancies in the fourth class to a choice from members of the fifth class, who are legally there at the time of the promotion, and, as that is what has been done in these cases, the relator must fail.

It must not be supposed that I do not assent to the views expressed by His Honor the Chief Justice, but I have preferred to base my judgment on the ground which impresses me most.

Rule nisi discharged, with costs.

Solicitor for the relator: *F. J. Stephen.*
Solicitor for respondent: *Guinness*, Crown Solicitor.

W. H. M.

IRWIN *v.* THE LAND COMPANY OF AUSTRALIA LIMITED.

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March 21, 22.

Water Act 1890 (*No.* 1156), *ss.* 103, 104—*Rates—Notice, objections to—Regulation, effect of—Supply of water to district—Retrospective rates.*

Where notice has been given, under sec. 103 of Act No. 1156, that part of a district has been supplied with water, and where a rate has been made by regulation, and such regulation has been published as provided by sec. 104, such rate so authorised has the force of law.

A person rated cannot take any objection as to the truth of the notice given under sec. 103 of Act No. 1156, and cannot adduce evidence for the purpose of showing that no water at all has been in fact supplied to any part of the district. The only objection open to a person rated is to show that no notice has in fact been given.

Notice may be given, under sec. 103 of Act No. 1156, so as to make the rates levied retrospective.

ORDER *nisi* to review decision of justices.

This was an order *nisi* to review the decision of justices at Charlton, whereby the defendant had been ordered to pay certain rates on a complaint for the recovery of the same. It appeared

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that the Avoca Water Trust was in 1882 created and duly incorporated under "*The Water Conservation Act* 1881," and its districts were declared by an Order in Council. Subsequently part of its district was declared an urban district under "*The Water Conservation Act* 1883." The Trust obtained a loan, and commenced the construction of its works. In August 1887 a notice, in accordance with the provisions of sec. 97 of "*The Victorian Water Conservation Act* 1883," was published in the *Government Gazette*, stating that certain parts of the district were supplied with water, and in January 1888 a further notice was published referring to other parts of the district, but neither notice included the parish of Yuengoon, which formed a large part of the district. These two notices, purporting to be signed by Mr. G. Croker, as secretary of the Avoca Water Trust, and his appointment as secretary, were put in evidence. Subsequently the Trust made default by neglecting to pay interest on the loan, and by neglecting to establish a sinking fund for the purpose of paying off the principal, and the Board of Land and Works gave the Trust due notice of its intention to enter, and on the 16th July 1889 the Board, in pursuance of sec. 90 of "*The Water Conservation Act* 1887," entered and took possession of the property of the Trust. There had been a mortgage executed by the Trust to the Board to secure the loan. After entering into possession, the Board appointed W. J. Irwin, the complainant in this case, to sue for and recover all moneys due to it. Some time afterwards the rates, the subject matter of the complaint, being three in number, were made, and the defendant was sued in respect of the same. The particulars annexed to the summons were as follow:—

"1890, 1st January; 1890, 1st July.—To rate payable by defendant company in two moieties on the first days of January and July respectively 1890, made under the provisions of the '*The Waterworks Conservation Act* 1887' by the Board of Land and Works, by regulation made by the said Board on the 24th December 1889, in respect of all rateable property within the district of the Avoca Water Trust not included within the boundaries of an urban district proclaimed on the 10th March 1885, being the sum of 1*s.* in the pound on the valuation, for the purpose of the said Act, of lands and tenements occupied by the defendant company in the parish of East Charlton, within the district aforesaid—48*l.* 10*s.*"

The second rate was 30*l.* 10*s.*, being a rate payable on 1st October 1890, pursuant to a regulation made by the Board on the 15th September 1890, in respect of all rateable property within that portion

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of the parish of Yuengoon included in the waterworks district of the Avoca Water Trust. The other rate sued for was for 69*l.* 18*s.*, payable on the 1st March 1891, pursuant to a regulation made on the 6th November 1890, in respect of all rateable property within the Avoca Water Trust district not included within the boundaries of an urban district proclaimed on 10th March 1885. The rate made on the 15th September 1890 was made retrospective to cover the whole of the year from 1st January 1890.

The justices made an order directing the defendant to pay all the rates sued for, and the defendant being dissatisfied with their decision obtained an order *nisi* to review it on the following grounds:—1. That there was no evidence that the Avoca Water Trust had authorised the notices that the district had been supplied with water. 2. That there was no evidence that Mr. G. Croker, the person purporting to sign such notices, was the secretary of the trust. 3. That evidence tendered to show that no water had been supplied to the parish of Yuengoon, and also that no water had been supplied to any part of the Trust district, was improperly rejected. 4. That there was no power to make the rate of 15th September 1890 for the parish of Yuengoon, inasmuch as a previous rate for the year 1890 for a district including such parish had already been made. 5. That there was no power to make a rate for the parish of Yuengoon for the whole of the year 1890, or for any period prior to the notice that such parish was supplied with water. 6. That there was no evidence that the mortgage of 1st January 1884 by the Trust to the Board of Land and Works was executed properly, or by or with the authority of the Trust. 7. That the evidence showed illegal borrowing and illegal expenditure by the Trust, and that the rates sued for were made or required merely to pay the principal or interest on moneys so illegally borrowed or expended. 8. That further evidence tendered to show such matters as last aforesaid was improperly rejected.

Madden (with him *Finlayson*) to show cause.

Weigall to move the rule absolute.

HIGINBOTHAM, C.J. This is an order to review an order of justices made on a complaint to recover payment of rates claimed

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from the defendant by the Board of Land and Works, who became possessed of the property of the Avoca Water Trust. Claims were made in respect of, first, a rate payable on the first days of January and July respectively 1890, pursuant to a regulation made by the Board of Land and Works on the 24th December 1889; secondly, a rate payable on the 1st of October 1890, by virtue of a regulation made by the Board on the 15th September 1890; and thirdly, a rate payable on the 1st March 1891, by virtue of a regulation made by the Board on the 6th November 1890. Eight objections are taken on the order to review this decision of the justices. The first and second objections are that there was no evidence that the Avoca Water Trust had authorised the notices that the district had been supplied with water, and that there was no evidence that Mr. G. Croker, the person purporting to sign such notices, was the secretary of the Trust. Now, in proof of the authorisation of these notices documents were put in evidence taken from the *Gazette*, which purported to be notices made by order of the commissioners, and signed by Mr. G. Croker, as the secretary of the Trust, and dealing with the lands included in the Avoca Water Trust, excluding the urban district, the second also dealing with the lands included in this district. Both these notices were put in without objection, and they are, we think, a sufficient answer to these first two contentions. They purported to be made by the Avoca Water Trust, and purported to be signed by the secretary, who proved that he acted as secretary, and, as they were admitted without objection, they were sufficient proof to justify the magistrates in concluding that the Avoca Water Trust had authorised these notices.

A third objection is that evidence tendered to show that no water had been supplied to the parish of Yuengoon, and also that no water had been supplied to any part of the trust district, was improperly rejected. This is the most important objection appearing on the face of the case. The Act requires that the rate shall not be made or levied by a water trust until notice has been given in the *Gazette* that the district has been supplied with water. Sec. 100 of "*The Water Conservation Act* 1887" provides that—

> "No rate shall be made and levied by a waterworks trust on any part of its waterworks district until notice has been given in the *Government Gazette* that such part is supplied with water under the provisions of this Act."

And by sec. 101 of this Act it is provided that—

"Any such rate may be made by a waterworks trust by regulation, and every such regulation shall be published once in the *Government Gazette* and once in some newspaper circulating in the water supply district, and from and after such publication shall have the force of law in such district."

Now, these two sections, we think, plainly indicate an intention on the part of the Legislature that while the rate shall not be made until after notice has been given that water has been supplied to the district, or part of the district to which the rate is applicable, after that notice has been given a rate may be made by regulation, and when made by regulation the rate shall have the force of law so as to prevent any question being raised as to the acts done precedent to the making of the rate, excepting the question whether the notice has been given or not, and the regulation published as provided by sec. 101 of the Act. It is always open to the parties, as has been held in the *Shepparton Cases* (16 V.L.R. 42), to show that notice has not been given; but in a proceeding of this kind it is not open to a party to show that the notice was not true, or that it was for any other reason open to objections. If the notice is given by a body that is empowered to give the notice, then immediately the power to make the regulation arises, and when the regulation has been duly published according to the Act, the rate authorised by the regulation becomes law, and there is no power given by this Act as is given by "*The Local Government Act*" to dispute the validity of the rate as a whole by proceedings to quash. The rate is final, and has the force of law. That answers objection 3. It also answers objection 4.

Then follows objection 5, that there was no power to make a rate for the parish of Yuengoon for the whole of the year 1890, or for any period prior to the notice that such parish was supplied with water. However, this notice states that in point of fact water had been supplied from the 1st of January 1890, and if it had been so supplied (and the notice is conclusive of the fact that it was so supplied), then the power to make a rate retrospectively arises, and we think that the Board had power to make the rate in September 1890 retrospectively for the whole year.

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Objection 6 is that there was no evidence that the mortgage of 1st January 1884 by the Trust to the Board of Land and Works was executed properly, or by or with the authority of the Trust. There was an instrument put in which purported to be a mortgage from the Trust to the Board of Land and Works. It bears the seal of the Trust, and it appeared in evidence that the Trust had made default in not paying interest and in not forming a sinking fund, and upon such default the Board had entered and taken possession, and thereupon made the rates. By sec. 90 of "*The Water Conservation Act* 1887" it is provided that—

"In case default be made in payment by any waterworks trust of the interest due by it on any loan granted by the Governor in Council to such waterworks trust, or in forming a sinking fund, or in payment of any other moneys due under this Act, the Board of Land and Works may, on giving one month's notice of such default to such waterworks trust, enter upon and take possession of its lands, tenements, and works, and maintain and manage the same, and may supply water within the waterworks district of such waterworks trust, and may do all things which might lawfully be done by such waterworks trust, in all respects as if such board were such waterworks trust."

It is unnecessary for us to decide whether it was essential that there should be a mortgage at all in this case. There was proof that a loan had been granted to this Trust by the Governor in Council for a particular purpose, and that there was default in carrying out that purpose, and that the Board remained in possession. We therefore think that this objection also fails. There was evidence, if necessary, that the mortgage was executed properly. It is *primâ facie* evidence from the affixing of the seal, and even if there was a deficiency in that evidence we are not satisfied that there was any need for a mortgage at all; there was default, and that is sufficient. These are all the questions that require to be dealt with, and all that were argued on the behalf of the respondent, and we think that the arguments have failed to support the grounds of the order to review, and the order to review will be discharged, with costs.

WILLIAMS, J. I only wish to say that in view of sec. 104 of the *Water Act* 1890, when once the regulation has been published in the *Government Gazette* and in some newspaper circulating in the water supply district, the rate is to have the

force of law, and that appears to me to be an answer to objections 3, 4, 5, 7, and 8.

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HOOD, J. I concur.

Order to review discharged.

Solicitors for the complainant: *Westley & Demaine.*
Solicitors for the defendant: *Cuthbert, Hamilton, Wynne & Co.*

W. H. M.

THE TRUSTEES OF THE ROYAL AGRICULTURAL SOCIETY *v.* MAYOR, ETC., OF ESSENDON.

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Local Government Act 1890 (*No.* 1112), *ss.* 246, 248—*Valuation of rateable property—Land used for public purposes—Crown grant subject to restrictions—Rates—Hypothetical tenant.*

Certain land was held by the trustees and council of the Royal Agricultural Society under a Crown grant to the trustees and their heirs "in order to provide a site for the show yards of the National Agricultural Society of Victoria for holding shows for the instruction of our subjects and people." There was a condition in the grant that the land and buildings should be at all times maintained and used as and for the show yards of the society, in accordance with regulations to be made by the Governor in Council, and for no other purpose whatsoever. It was further provided the Crown should have power to re-enter if the trustees should permit or suffer the land or premises, or any part thereof, to be used for or applied to any other than the purposes before set out, or to become out of proper repair, or should alienate or attempt to alienate in fee simple, or for less estate or interest, the land so demised to them. The trustees were empowered, subject to the approval of the Governor in Council, to make regulations for "the collection and receipt by such trustees of tolls, entrance fees, or other charges for entering in or upon such lands, or any specified part or parts thereof." The trustees were precluded by the grant from making any profit out of the occupation of the land. The trustees were rated by the town council of Essendon in respect of this land at 1,500*l.* per annum.

At the hearing of the appeal brought by the trustees at the Court of General Sessions, it was admitted that the land was rateable, and that 1,500*l.* was the fair annual value of the land. The town valuer, in his evidence, stated that other land in the vicinity was valued at 800*l.* an acre, but that in view of the restrictions placed upon the trustees as to the use of this particular land he had valued it at 400*l.* an acre. The trustees put in evidence the printed balance-sheet, and also proved that the society got no income from sheds or exhibits after the shows. The Court of General Sessions allowed the appeal, and reduced the rate to 1*s.*

Held, upon appeal to the Full Court [HIGINBOTHAM, C.J., HOLROYD, WILLIAMS, A'BECKETT, HODGES, and HOOD, JJ.], that upon the evidence the Court of General Sessions was right.

Dimey v. *Williamstown* (15 V.L.R. 59) approved.

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Per HIGINBOTHAM, C.J. Occupiers of land under a Crown grant, who are restricted by the conditions of the grant from deriving any profit from the occupation of the property, are not subject to be rated at more than a nominal rate in respect of the property.

Under sec. 248 of Act No. 1112 it is the net annual value, and not the net annual income, that has to be ascertained for the purpose of rates.

The Trustees of the Victorian Rifle Association v. *Williamstown* (16 V.L.R. 251) approved.

Per HOLROYD, J. Under sec. 248 of Act No. 1112 the valuer has to compute what rent the hypothetical tenant would probably give, supposing such tenant could deal with the profits from the land as he deemed fit.

The Trustees of the Victorian Rifle Association v. *Williamstown* (16 V.L.R. 251) dissented from.

Per WILLIAMS and A'BECKETT, JJ. Land held under a grant from the Crown, imposing conditions and restrictions upon the use thereof, but from which revenue may be raised, though such revenue must be applied solely to the purposes of the trust, cannot be said to have no annual value for the purposes of rating, and some method of calculation analogous to that provided by sec. 248 of Act No. 1112 must be resorted to for the purpose of fixing the rate.

The Trustees of the Victorian Rifle Association v. *Williamstown* (16 V.L.R. 251) dissented from.

Per HODGES, J. *The Trustees of the Victorian Rifle Association* v. *Williamstown* (16 V.L.R. 251) dissented from.

Per HOOD, J. To arrive at the net value of the land it must be considered with all its natural and statutory advantages and disadvantages.

In valuing land for the purpose of rating under sec. 248 of Act No. 1112, the substantial question to be considered is—What would the property bring in the open market burdened with the conditions in the Crown grant?

Property subject to the conditions and restrictions of this Crown grant has no marketable value, and the rate should be fixed at the nominal sum of 1*s.*

The Trustees of the Victorian Rifle Association v. *Williamstown* (16 V.L.R. 251) approved.

SPECIAL CASE stated by Chairman of General Sessions.

The following was the case as stated:—The appellants were rated by the town council of Essendon in respect of certain land within the town of Essendon at 1,500*l.* per annum. Against this rating the appellants appealed to the Court of General Sessions of the Peace, pursuant to the *Local Government Act* 1890, sec. 277. The following evidence was taken:—For the purposes of this appeal the appellants admit that 1,500*l.* is the fair annual value of the land in question, with its existing improvements. J. M. Bland, rate collector and valuer of the town of Essendon, deposed: "I valued the land in question at 1,500*l.* per annum, *i.e.*, 5 per cent. on 30,000*l.* capital. Other properties there are valued at 800*l.* per acre; this at about 400*l.* per acre, in view of restrictions imposed

by the Crown grant. An owner might fairly expect 6 per cent. net at least on capital value." Cross-examined: "I value the improvements at 800*l.* yearly, *i.e.*, 5 per cent. on 16,000*l.* Last year the society's rates were by consent fixed at 1*s.* No improvements in value since. My predecessor as valuer, in my opinion, valued too high. His valuation (produced) is 950*l.* My reason for reducing the valuation from 800*l.* to 400*l.* per acre was that this was a national society." The Crown grant was put in. Re-examined: "I heard an argument in court as to what the restrictions in the Crown grant were. A condition in favour of holders of miners' rights or mining leases working on the land I did not take into consideration. The fact that the grounds were to be used as show yards and exhibitions of stock was what I took into consideration." Respondents' case closed.

For the appellants' case the printed balance-sheet of appellants' society was put in by consent. Thomas Patterson, the secretary of appellant society, deposed: "The items, 'Show yard account, 43*l.* 16*s.* 9*d.*,' are the receipts from agistment, galas, and everything else outside the annual shows." Cross-examined: "Picnics and sales of blood stock are held by permission of the Minister in each case. Show lasts four days. The society gets no income from sheds and exhibits after the shows."

The Court allowed the appeal, and reduced the rate to 1*s.* The nature of the Crown grant is set out in the judgments. This case was argued in August 1891 before the Full Court, consisting of Higinbotham, C.J., A'Beckett and Molesworth, JJ.; but inasmuch as the decision of the Full Court in *Trustees of the Victorian Rifle Association* v. *Williamstown* (*a*) was sought to be questioned by counsel in argument, the case was now set down for argument before all the judges of the Supreme Court.

J. Dennistoun Wood for the respondents—This land is clearly rateable. Sec. 246 of the *Local Government Act* 1890 provides that "all land shall be rateable property within the meaning of the Act," with certain exceptions; this land does not come within those exceptions. Then sec. 248

(*a*) 16 V.L.R. 251.

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provides for the computation of the value of the land for the purpose of rating (*b*). Five per cent. is fixed as an arbitrary minimum limit upon the "fair capital value of the fee simple." The fee simple is mentioned in distinction to those pastoral leases mentioned in the last clause. Fee simple means the land possessed in its fullest manner, whether the title be in the Crown or in a private individual. If land the fee simple in which remains in the Crown, but which is occupied by a private person, is liable to be rated at five per cent., it is clear that we are not to regard any instrument which affects the land, but we are to look at the land itself. It cannot be said that a lessee can cut down the rateable value of land by inserting conditions in the lease. The fee simple is the highest estate in the land, and we have nothing to do with conditions attached by a private person, or by the Crown to a private person, for if so the rates would be for ever fluctuating. There is nothing in the Act, and there is no principle of law, which can make any distinction between the restrictions upon the enjoyment of the land, whether such restrictions be created by the Crown or by a private individual. The capital value is what the land would sell for, and the land itself does not lose its capital value because the Legislature passes an enactment forbidding its sale. In the case of *Sunderland* v. *Sunderland Union* (*c*), Erle, C.J., says:—"It is therefore commanded by those Statutes, as I understand them, that the estimate of the rental should be confined to corporeal hereditaments, and should be founded on the more permanent elements of value found therein, excluding the effect of temporary contracts and other such accidents." In that case it was admitted that the land might become so unprofitable by reason of the conditions attached thereto that the tenant would have to carry it

(*b*) "Sec. 218. . . . And in every such valuation the property rateable shall be computed at its net annual value, that is to say, at the rent at which the same might reasonably be expected to let from year to year free of all usual tenants' rates and taxes, and deducting therefrom the probable annual average cost of insurance and other expenses (if any) necessary to maintain such property in a state to command such rent. Provided that no rateable property shall be computed as of an annual value of less than five pounds per centum per annum upon the fair capital value of the fee simple thereof, but that every person occupying (otherwise than under any lease) Crown lands for pastoral purposes only shall be rated in respect of such annual value thereof as aforesaid, and not on the capital value thereof."

(*c*) 18 C.B. (N.S.) 531, 570.

on at a loss, and yet the land would be rateable. The land must be rated according to the value of the fee simple; fee simple is defined in *Coke. Litt.*, Lib. 1 [1. b.], as being an estate without conditions or limitations which defeat or abridge the fee.

[HOLROYD, J. Do you then give any meaning to the word "fair" in the clause?]

It is hard to say how that word came in, but I presume it means "average" value. It may mean what the land in the hands of the Crown would fetch in a fair market. Assuming for the sake of argument that the Court can consider the conditions and restrictions to which this land is subject, even then the society is to be rated at something more than a nominal sum. In the argument in the case of *The Trustees of the Victorian Rifle Association* v. *Williamstown* (*d*)—which is a decision admittedly against the respondent in this case—certain English authorities were not cited. The land is rateable, as it does not come within the exemptions of the section, and if rateable there is no principle of calculation which has been given or proved by which the rate of 1*s.* can be arrived at. The land is either not rateable at all, or it must be rated according to the statutory computation. If a person may be found who is willing to pay a nominal rent for the benefit of the public, the Court has no power to assume, without any evidence, that a person could not be found who would be willing to pay more than a nominal rent. The test is not what *the* tenant would pay, but what *a* tenant might reasonably be expected to pay: *The Queen* v. *School Board for London* (*e*). In the case of *Owen's College* v. *Overseers of Chorlton-upon-Medlock* (*f*), an Act had been passed which prevented the college from becoming tenant of land, and therefore it was excluded from the class of hypothetical tenants; but here there is nothing to prevent this society from becoming tenant of land for the purposes of exhibition. In *Owen's College Case* the Court looked at the fact that the restriction was imposed upon the college itself, and not upon the land. There is nothing in *The Land Act* which could prevent the Crown granting a lease of this land to the society instead of granting the fee simple. The question as to the application of the income derived from the

(*d*) 16 V.L.R. 251. (*e*) 17 Q.B.D. 738.
(*f*) 18 Q.B.D. 403.

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restricted use of the land is not to be regarded; the one material point is whether the tenant *gets* income.

Counsel also referred to the following cases: *Mayor of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent* (*g*); *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union* (*h*); *Mersey Docks Company* v. *Cameron* (*i*).

Coldham for the appellants the Trustees and Council of the Royal Agricultural Society of Victoria—There are really two bodies in the constitution of this society; the society itself and the trustees of the society. The holding by the society under the Crown grant does not give the society such an occupancy of this land as to bring it within the meaning of the Act at all. The trustees are merely bare trustees; they cannot charge anybody for the use of the land, but hold it simply that somebody else may use it. The trustees allow the society to use it, but the trustees cannot make any charge. There are two restrictions under the grant; restrictions on the tenure, and restrictions on the use of the land. Such restrictions practically render the land valueless in the sense in which the word "value" must be regarded in construing this sec. 248. The object of the Legislature was to make persons contribute towards the rates of the country out of property possessed by them, but it was never intended that persons who got no advantage or income out of the land should contribute anything. A nominal rate may be fixed on the same principle that nominal damages in an action for breach of contract may be awarded. The appellants cannot be taken as hypothetical tenants, and even if they could it would still be necessary to consider the restrictions contained in the grant. In the English cases which have been cited the parties included in the class of hypothetical tenants are parties who could have leased the land; in this case the appellants could not lease the land. The tenure of the land as it now is must be regarded. Even assuming that the appellants could be regarded as hypothetical tenants, the Court would have to say what a tenant would give for land subject to these existing limitations and

(*g*) 24 Q.B.D. 197. (*h*) 17 Q.B.D. 384.
(*i*) 11 H.L.C. 440.

restrictions: *Corporation of Worcester* v. *Droitwich Assessment Committee* (*k*). The judge has found as a fact that a reasonable man would give 1*s*. for the land, and this Court will not review that finding. In the case of *West Bromwich School Board* v. *Overseers of West Bromwich* (*l*), the principle was laid down that a person can be rated only when he has a beneficial interest in the property, and the test of beneficial interest was defined as depending upon the fact whether the owner can find a tenant who will pay rent. Where the occupiers of land otherwise rateable are restricted by Statute from using it for profitable purposes, then they should not be rated at all: *Corporation of Peterborough* v. *Stamford Union* (*m*); *Altringham Union Assessment Committee* v. *Cheshire Lines Committee* (*n*). The fact of the Crown grant imposing the restrictions must be considered as having the same effect as if such restrictions were imposed by Statute.

J. Dennistoun Wood in reply—There is a great distinction between an Act of Parliament, disobedience to which is illegal, and the non-compliance with the conditions of a Crown grant.

Cur. adv. vult.

HIGINBOTHAM, C.J. This is an appeal by the mayor, councillors, and ratepayers of the town of Essendon from the decision of the Court of General Sessions at Melbourne, by which a rate, made by the appellants on land within the town of Essendon at 1,500*l*. per annum, was reduced to 1*s*.

The land in question is held by the trustees respondents, under a Crown grant dated 27th August 1886 to the trustees and their heirs, "in order to provide a site for the show yards of the National Agricultural Society of Victoria for holding shows for the instruction of our subjects and people." The Crown grant contains certain provisoes and conditions, one being that the land and buildings shall be at all times maintained and used as and for the show yards of the National Agricultural Society of Victoria, in accordance with regulations to be made by the Governor

(*k*) 2 Ex. D., p. 61.
(*l*) 13 Q.B.D. 929, p. 941.
(*m*) 31 W.R. 949.
(*n*) 15 Q.B.D. 597.

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in Council, and for no other purpose whatsoever. It is also provided by the grant that the Crown may re-enter if the trustees should permit or suffer the land or premises, or any part thereof, to be used for or applied to any other than the purposes aforesaid, or to become out of proper order and repair, or should alienate or attempt to alienate in fee simple, or for any less estate or interest, the land and premises or any part thereof, save in pursuance of the power contained in the deed to raise a sum of money not exceeding 15,000*l.* for the objects of making substantial and permanent improvements thereon. Prior to the issue of the Crown grant the land was permanently reserved from sale under the authority of "*The Land Act* 1884," sec. 10, authorising the permanent reservation from sale of Crown lands for any public purpose whatsoever, including the purpose of public education. The trustees are empowered by sec. 2 of "*The Land Act* 1889," which has a retrospective operation, to make with the approval of the Governor in Council, rules and regulations for, amongst other things, "the collection and receipt by such trustees of tolls, entrance fees, or other charges for entering in or upon such lands or any specified part or parts thereof." It is admitted that in these and in all other material particulars the powers and obligations of the respondents, as defined by the deed in this case, are not distinguishable from those of the trustees in the case of *Disney* v. *The Mayor, etc., of Williamstown* (*o*), which was confirmed and explained in a subsequent judgment of this Court, reported in 16 V.L.R. 251, under the title of "*The Trustees of the Victorian Rifle Association* v. *The Mayor, etc., of Williamstown.*" The present case was argued before the Full Court, consisting of three judges, on the 19th and 20th August last year, and in consequence of doubts entertained by some members of the Court as to the application of the rule of computation of value of the rateable property at the net annual value prescribed by sec. 248 of the *Local Government Act* 1890, it has been deemed advisable, in view of the great importance and difficulty of the questions involved in the appeal, to have the whole case re-argued in this Court before all the judges.

Much of the confusion arising from the English authorities which have been cited will be removed if we remember that neither

(*o*) 15 V.L.R. 59.

in the present case, nor in *Disney's Cases*, did the question of the rateability of the land come before us for determination. It has been admitted in both cases that the land is rateable property within sec. 246 of the *Local Government Act* 1890, and for this reason the Court in *Disney's Cases*, and the Court of General Sessions in the present case, allowed the rate to stand, but reduced it to a nominal amount. In Victoria, by virtue of this sec. 246, all land is rateable property except in certain enumerated cases. The English authorities on the subject of rateability for the poor, including the leading case of the *Mersey Docks Company* v. *Cameron* (*p*), decided in 1864-5, which swept away a large number of earlier decisions, have turned upon the meaning and effect of the Statute 43 Elizabeth, chap. II. They decided that under that Statute the liability to be rated attaches, except in the case of the Crown, upon every occupation from which benefit is derived, although the occupation be for a purpose which may be deemed to be of a public nature. If the occupation be beneficial, the fact that such occupation is of necessity applicable solely to purposes, whether public or otherwise, from which the occupiers receive no personal benefit, is not a ground of objection to the property being rateable: *St. Thomas's Hospital* v. *Lambeth Overseers* (*q*). These authorities, together with all questions concerning the beneficial occupation of land, should be dismissed from consideration as inapplicable to Victorian law on the subject of rateability. The English and the Victorian law are, however, substantially the same in respect to a wholly different part of this subject, namely, the computation of the value of property, admitted to be rateable, at its net annual value. The law of England upon this subject is laid down by the Parochial Assessment Act, 6 and 7 William IV., chap. 96, sec. 1., as follows:—

"No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenants' rates and taxes and tithes commutation and rent charge, if any, and deducting the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

(*p*) 11 H.L. 440; 35 L.J. Mag. Cas. 1.

(*q*) 45 L.J. (N.S.) Mag. Cas. 24.

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Sec. 248 of the *Local Government Act* 1890 contains similar provisions in the same terms, with an immaterial difference. The case of the *Corporation of Worcester* v. *Droitwich Assessment Committee* (*r*), upon which the judgment in *Disney* v. *Mayor, etc., of Williamstown* (*s*) was founded, is a decision of an English Court of Appeal, turning on the rule given by the above section of the Parochial Assessment Act, and it is therefore a decision which this Court recognises as binding on it. In *Trimble* v. *Hill* (*t*) the opinion was expressed by the Judicial Committee of the Privy Council that, where a colonial legislature has passed an Act in the same terms as an Imperial Statute, and the latter has received an authoritative construction from a Court of Appeal in England—by which all the courts in England are bound until a contrary determination has been arrived at by the House of Lords—such construction should be adopted by the courts of the colony. This opinion or suggestion is founded on the view that "it is of the utmost importance that in all parts of the Empire where English law prevails the interpretation of that law by the courts should be as nearly as possible the same." The suggestion comes to this Court from the highest authority, and the reason assigned for it has had our entire concurrence: See *Cremar* v. *Cremar* (*v*); *In re Annand* (*w*). In the case of the *Corporation of Worcester* v. *Droitwich Assessment Committee* (*r*) it was held that where land is used for a public purpose, and the occupiers thereof are prevented *by Statute* from deriving the full personal benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, and not with reference to the amount which might be earned by a trading company, or other occupier, not subject to the statutory restriction. It was admitted that the waterworks, in respect to which the rate in that case was fixed, were rateable property; the question in dispute was to what extent they were liable to be rated. The Court of Appeal held that the corporation could only be assessed for the rent which a tenant from year to year would give for the land, subject to the same statutory restrictions as those under which the corporation held it,

(*r*) 2 Ex. D. 49.
(*s*) 15 V.L.R. 59.
(*t*) 5 Ap. Ca. 344-5.
(*v*) 12 V.L.R. 744.
(*w*) 17 V.L.R. 108.

and not that which a tenant entirely unfettered might give. "The hypothetical tenant," the Court said, "is to be a tenant subject to the restrictions. The case of *Corporation of Liverpool* v. *Overseers of Wavertree*" (reported in note to page 55, 2 Ex. D.) "is directly in point, and we are of opinion that that case was correctly decided. Blackburn, J., there says: 'The whole question turns upon the rule given by the Parochial Assessment Act, which says the occupier is rateable at what a tenant from year to year will give as the rent, who takes the land subject to the same restrictions as those under which the tenant holds it.' This decision seems to us to be right on principle. An occupier of land is not rateable in respect of the whole profit derived from the land, but only in respect of the profit which he himself derives from the land." The corporation in that case were authorised by the "*Public Health Act* 1848," sec. 17, to charge such a rate only as might be reasonably expected to be necessary to defray the expenses incident to the water supply, and they accordingly fixed a price to be paid by the inhabitants for water so low as to leave a net profit of only 600*l.* upon rates actually received after deducting the expenses connected with providing the water and collection of rates. This sum represented the amount which the corporation failed in their prospective estimate to deduct from the water rate in accordance with the statutory direction; it was undoubtedly profit earned during the year in consequence of the erroneous estimate, and it was properly admitted by the corporation to be profit, and it was accordingly agreed that it should be taken as the gross estimated annual value of the land and works, and the rateable value, reduced by the statutory deductions, was fixed at 540*l.* It necessarily follows from the principle laid down in this case that, if the occupier is restricted by Statute from deriving any profit at all from his occupation, the hypothetical tenant, who has to be taken to be subject to the same restrictions as the occupier, will not give any rent for the land, and consequently that the land, although rateable, and therefore liable to be rated at a nominal sum, cannot lawfully be rated at more than a nominal sum. *Disney* v. *Mayor, etc., of Williamstown* (*x*) was decided by this Court in accordance with the principle here laid down. We held that the restrictive conditions

(*x*) 15 V.L.R. 59.

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of a Crown grant of land, permanently reserved for the purpose for which land is authorised by an Act of Parliament to be permanently reserved and alienated, would have the same effect as an Act of Parliament, and that as the trustees in that case could not consistently with the terms of their trust derive any profit whatever from the rifle ranges, while they were at the same time bound to maintain the ranges, the rate should be reduced to a nominal amount.

It has been contended in the recent argument that the net income of the trustees, that is to say the moneys received by them from any source beyond what is required to defray necessary expenses and to keep the land and buildings in proper order and repair, should be treated as the net annual value of the property, or the rent at which it might reasonably be expected to let from year to year. In the *Droitwich Case* the net income of 600*l.* was profit which the corporation had made during the year in consequence of their erroneous estimate, and it was, therefore, properly taken to be the gross estimated annual value from which the rating value could be calculated. In *Disney's Case*, and in the present case, the net income is not profit in any sense of the word, for the trustees are bound by the terms of their grant to apply it to purposes of their trust, and it has not been suggested that they have not so applied it. This argument also assumes that the hypothetical tenant would not be bound by the obligations cast upon the trustees, and might be regarded as entitled to apply such net income to his own purposes. But this view is inconsistent with the authority upon which our first decision was founded, and it is opposed, I think, to the principle of the test of computation laid down by the Act. If the trustees are restricted by the conditions of the grant from deriving any profit from the occupation of the property, and if the hypothetical tenant is also bound by the same restrictions, he cannot be conceived to be at liberty to take for himself as profits what are not profits in the hands of the trustees. The net annual value, not the net annual income, is the fact to be ascertained, and the Act prescribes that the mode by which that value is to be ascertained is by considering what rent a tenant from year to year would give for the property. If the property has no annual value, no sane person would give any rent for it, and consequently the property, although rateable, and therefore

liable to be rated at a nominal amount, cannot by the application of this statutory test of computation be rated at more than a nominal amount.

It has been further argued for the appellants that the trustees themselves might be regarded as the hypothetical tenants of this land, and that the gross and rateable values might be calculated by the rent which the trustees might reasonably be expected to pay for the land for the purposes of the trust. *The Queen* v. *The School Board for London* (*y*) was relied on in support of this view. In that case the School Board could be a tenant of the premises, and it was admitted that if by the terms of any Statute the School Board could not legally be tenant, it would be excluded from the calculation: See *per* Lord Esher, M.R., page 740. That case was followed by the case of *The Owen's College* v. *Overseers of Chorlton-upon-Medlock* (*z*). There trustees were incorporated under an Act of Parliament for the purpose of establishing and for ever maintaining a college for educational purposes. They were by the Act empowered to acquire and hold as owners in fee simple the land as a site and to erect buildings thereon for the college, and they had no power to sell or let the land so acquired, though they were not expressly prohibited from doing so. It was held that the trustees could not become tenants of any site for the purposes of the college, but that the only site they were authorised to take was one which they were to acquire as owners in fee simple: *Per* Lord Esher, page 407; also, that the land after it was acquired by the trustees was dedicated for ever as a site of a building for the college; that the trustees were incapable of hiring that land for the purposes of a college, and that being prohibited from hiring that land they could not therefore be taken into consideration as possible tenants: *Per* Fry, L.J., page 411. The same distinction was recognised in *The Mayor of Burton-upon-Trent* v. *The Assessment Committee of Burton-upon-Trent Union* (*a*). Applying the doctrine of these decisions to the present case, I think that the trustees could not, as owners in fee simple under the terms of the Crown grant, ever become tenants from year to year of this land for the purposes of their trust, and they cannot, therefore, be taken into consideration as possible or hypothetical tenants.

(*y*) 17 Q.B.D. 738. (*z*) 18 Q.B.D. 403. (*a*) 24 Q.B.D. 197.

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The twofold argument for the appellants on this part of the case has, in my opinion, failed. The test of net annual value is sometimes an unreal test and difficult to apply to the subject-matter rated: *Per* Lindley, L.J., in *Smith* v. *Churchwardens of Birmingham* (*b*). If this test can be applied, and is applied in the present case to the land rated, the resulting net annual value, and consequently the rate, can only be nominal; if on the other hand the test cannot be applied because the land is held in fee simple by the trustees, neither they nor anyone else could hold it as tenant from year to year. The result is the same, and the land, though rateable, can only be rated for a nominal amount.

The argument addressed to us on the second test of rateable value contained in sec. 248 of the *Local Government Act* 1890, namely, 5*l.* per cent. (reduced by a later Act to 3*l.* per cent.) upon the fair capital value, has not altered the view expressed by the members of the Court on this subject in *Disney* v. *The Mayor, etc., of Williamstown* (*c*). I adhere to the views on both the points determined by the Court in that case. The subsequent case of *The Trustees of the Victorian Rifle Association* v. *Mayor, etc., of Williamstown* (*d*), requires an obvious verbal correction to avoid a possible misapprehension by the addition of the words "beyond a nominal amount" after the word "rated" in the tenth line from the bottom of page 254. The judgment so corrected is, in my opinion, that which it purports to be, namely, an explanation of the earlier decision, and consistent with it. It in no way alters or extends the previous decision of the Court. I am of opinion that the decision of the Court of General Sessions was correct, and that it ought to be affirmed.

The determination of the Court is that the decision of the learned chairman of the Court of General Sessions shall be upheld.

HOLROYD, J. Sec. 248 of the *Local Government Act* 1890 is not easy to construe. If we discard the authorities and look at the section as it stands, what do we find? We find that in valuing any rateable property within a municipal district it is the net annual value that is first to be computed, and the section defines what that value is. It is the rent at which the property

(*b*) 22 Q.B.D. 708. (*c*) 15 V.L.R. 59. (*d*) 16 V.L.R. 251.

might reasonably be expected to let from year to year free of all usual tenant's rates and taxes, *less* the probable annual average cost of insurance and other expenses (if any) necessary to maintain the property in a state to command such rent. We cannot read the definition quite literally, for if the property could not be lawfully let from year to year it could not reasonably be expected so to let at any rent, and the owner might easily lay upon the occupier a prohibition which would practically exempt the property from being rated at all to the mutual advantage of both parties. The valuer must be intended to assume for the purpose of his computation that the property can be lawfully so let. The whole scheme of computation rests upon hypothesis. If you can suppose a person desirous of becoming a tenant, why not suppose also that it would be legal to let to him from year to year. The annual value, when computed, is to be taken as the rateable value of the property, provided it does not fall below 5 per cent. (since altered to 3 per cent. by the "*Local Government Act* 1891," sec. 55) upon the fair capital value of the fee simple, in which case 5 per cent. upon the fair capital value of the fee is to be deemed the rateable value. The first question, then, which the valuer has to ask himself is, what rent might the person liable to pay the rate upon this property, whether occupier or owner, reasonably expect to get for it, if it were lawful for him to let it, and he wanted to let it, from year to year? And for the purpose of this computation he must take the property as he finds it, and not speculate as to the purposes to which it might by the expenditure of money be converted. The probable cost of maintenance in *statu quo* is to be deducted from the rent that might be obtained, not the cost of conversion into something different, as of a house into a shop, or pasture land into arable. Should the property from any cause be so unsuitable for letting from year to year that it would be unreasonable to expect it to yield a rent equal to the requisite percentage on the capital value, then the valuer is to calculate the capital value of the fee simple, that is, what sum the fee simple would fetch in the market if judiciously sold, which would depend very much upon the purposes to which it could be converted by a buyer, and the demand for property of that description in the neighbourhood. To answer the question as to annual value

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the valuer will naturally inquire, what is the property fit for—for what can it be used? At this stage he may encounter a difficulty which would not be likely to occur to his mind unless it were subsequently brought home to him by an appeal against his valuation. Is he to confine his researches to the description, character, and condition of the property, as, if it be in town, whether it be mansion, shop, cottage, or factory, what accommodation it affords, in what locality it is situate, and whether it be in good or bad repair? Or, must he push his investigation farther to ascertain whether any conditions or restrictions have been imposed upon the enjoyment of it? I do not speak of conditions intended merely for preserving its character, as by preventing a dwelling from being converted into a shop, or arable land into pasture, but arbitrary conditions, and such as would diminish the amount of the rent that a person desirous of becoming a tenant from year to year might otherwise be expected to offer for the property as it is. Now inasmuch as rateable property is all land, and all land is rateable property except what is expressly excepted by the Act, and the assessment for rating is not to be fixed at less than a certain percentage upon the capital value of the fee simple, which is the largest estate that can be had in the land, it appears to me, apart from authority, that when any such conditions or restrictions as I have mentioned, which affect the enjoyment only, have been imposed, whether by a private individual or by the law, they ought not to be taken into account, or at least not in estimating the capital value. It seems now to be admitted that, if any such have been imposed by a private individual, they ought to be disregarded. But in the case of *Disney* v. *The Mayor, etc., of Williamstown* (*e*) it was undoubtedly decided that when the user of the property rateable has been restricted, or conditions have been attached to it by law, such restrictions and conditions must not be overlooked in the computation either of the annual value or of the capital value. I confess that, if the matter were *res integra*, I should be disposed to call in question the soundness of that decision. I cannot in this instance appreciate the distinction between restrictions imposed by law and restrictions legally imposed by a private individual. But seeing that the

(*e*) 15 V.L.R. 59.

decision referred to, besides being supported by English authority, has met with the unanimous approval of my brother judges, I must treat this point as finally settled. It has however been supposed that something more than I have stated was decided in *Disney's Case*, although the judgment of my brother A'Beckett, when carefully examined, convinces me that he personally intended to go no further. The subsequent case of *The Trustees of the Victorian Rifle Association* v. *The Mayor, etc., of Williamstown* (*f*) was founded upon *Disney's Case* and purported to follow and explain it, and there it was distinctly laid down that not only restrictions upon the enjoyment of the property but also conditions affecting the disposition of the profit that might be derived from it were to be regarded in the valuation. In delivering the judgment of the Court, of which I was a member, the learned Chief Justice says:—"It does not matter what revenue the trustees raise or might raise for the lawful use of the land for the purposes of the trust. . . . . But they are bound to apply the whole of the revenue so raised solely to the purposes of the trust. They have not in law any beneficial occupation of the land, and they cannot lawfully derive any benefit whatever for themselves from the revenue raised from the land." The words "for themselves" have slipped in inadvertently. All that was intended to be said was that the occupation could not be beneficial at all by reason of the direction to apply the revenue to the purposes of a public trust. Upon a re-consideration of the whole matter, and feeling myself for the moment untrammelled by authority, I think it is only by putting a forced construction upon the 248th section that the principle enunciated can be spelt out of it. According to what I conceive to be the natural construction the valuer is to compute what rent the hypothetical tenant would probably give, supposing that he could do as he pleased with any profit that he might get from the land; and, were I not bound by *Disney's Case*, I should add, and supposing that he could use the land as he liked, so long as he did not alter its character. It seems still more plain to my comprehension that the value of the fee simple should be assessed as if it were unfettered by conditions. If conditions must be regarded, why not inquire to what encumbrances, if any, the

(*f*) 16 V.L.R. 251.

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property is subject? Upon the question which was debated before us I think not much assistance can be derived from the English authorities. I should pay great respect to English precedent where our Legislature had expressed its whole intention in the language of an English Act of Parliament, and particularly where the circumstances were identical or closely similar. But it is quite a different thing to follow the English interpretation of a scrap of an Act or a fragment of a section, and especially so when the circumstances to which it has to be applied are dissimilar. The addition of a clause or a change of circumstances may put an entirely different complexion upon the enactment. The proviso in sec. 248 of our *Local Government Act*, which is highly important and furnishes a key to the section, is not contained in sec. 7 of the English Act, 6 & 7 W. IV., c. 96, "An Act to regulate Parochial Assessment;" and sec. 1 of the English Act contains a proviso which is not to be found in our Act.

The Court of General Sessions in this case has stated the facts specially for the determination of the Supreme Court thereon. We were told that the Court proceeded in its judgment upon the principle that conditions imposed by law respecting the application of the revenue that might be derived from rateable property, as well as those restrictive of the user of it, were to be taken into account in assessing either the net annual value or the capital value. That I think wrong. But following, as I must, the rule as to restrictions on user laid down in *Disney* v. *The Mayor, etc., of Williamstown*, the rate, in my opinion, was properly reduced by the Court to 1*s*. The Crown grant under which the land was held by the trustees recites that it had been permanently reserved from sale by the Governor in Council for the purposes thereinafter appearing; and provides that the grant shall be subject to certain conditions, amongst others that the land granted and the buildings thereon shall be at all times thereafter used as and for a site for the show yards of the National Agricultural Society of Victoria, and offices and conveniences connected therewith under such regulations as shall from time to time be made by the Governor in Council and in the meantime under regulations to be made by the trustees *and for no other purpose* whatsoever. The grant also contains a clause of re-entry in certain events, and amongst them

in the event of the trustees permitting or suffering the premises or any part thereof to be used for or applied to any other purpose with an exception of no moment as regards this argument. It would be unreasonable in my judgment to expect that any person would become tenant from year to year of this land at any rent subject to such conditions, or that the fee simple, if the enjoyment of the land were hampered in this way, could have any marketable value.

A'BECKETT, J. This is an appeal from a decision of a Court of General Sessions reducing the valuation of land held upon trust for public purposes from 1,500*l.* a year to 1*s.* The conditions of the Crown grant are substantially identical with those of the grant which was considered by this Court in the cases of *Disney* v. *The Mayor, etc., of Williamstown* (*g*), and *The Trustees of the Victorian Rifle Association* v. *The Mayor, etc., of Williamstown* (*h*). As frequent reference to these cases is necessary, I will refer to them as *Disney's Case* No. 1, and *Disney's Case* No. 2.

When the appeal was first heard the respondents' counsel informed us that the learned judge at General Sessions had reduced the rate to 1*s.* on the authority of *Disney's Case* No. 2, and counsel before us relied on that case as concluding the matter, as it undoubtedly did. Two of the judges who heard the appeal dissented from *Disney's Case* No. 2, but as it was a decision of the Full Court it was thought desirable to have the appeal re-argued before all the judges.

It is to be observed that the decision in *Disney's Case* No. 2 purports to follow the previous decision in *Disney's Case* No. 1, but in fact it decides a new point. In *Disney's Case* No. 1 the justices upheld the contention that the fee simple should be valued without taking into consideration the conditions and restrictions of the Crown grant, and the question for the opinion of the Full Court was whether this determination was erroneous in point of law. It was held to be erroneous. In *Disney's Case* No. 2 it was decided that no matter what amount of revenue might be raised consistently with the terms of the grant, inasmuch as the trustees

(*g*) 15 V.L.R. 59. (*h*) 16 V.L.R. 251.

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were bound to apply the whole of the revenue so raised solely to the purposes of their trust, they had not in law any beneficial occupation, and the land was exempt from liability to be rated.

Now, although in *Disney's Case* No. 1 there are *dicta* in the judgment of the learned Chief Justice to that effect, they go beyond anything which was argued or decided in that case. It is one thing to say that when the conditions of a Crown grant reduce the income which can be produced by the land, the value of the land is to be measured by its reduced income, and another thing to say that when the land comes to be rated this reduced income is to go for nothing because it is to be applied to trust purposes. As one of the judges who heard *Disney's Case* No. 1, I said:—"When lands have been vested in trustees for purposes of public utility, as for water or gas supply, the annual value is not to be assessed by treating the lands as available for ordinary letting purposes. The net revenue derivable from the property used, as law requires it to be used, is the basis of valuation." If *Disney's Case* No. 2 were reversed it would leave untouched the decision in *Disney's Case* No. 1.

I now proceed to state my reasons for dissenting from *Disney's Case* No. 2. According to English decisions, although legal restrictions upon the use of land are to be regarded in measuring its productiveness for rating purposes, the land is rateable, although the income produced is to be applied to public purposes or charitable purposes from which the occupant can derive no benefit. "If any profit be made, the application of it when made is immaterial to the question of rateability:" *The King* v. *Inhabitants of St. Giles, York* (*i*). A series of decisions has established the principle stated as follows by Lord Chelmsford in *St. Thomas's Hospital* v. *Lambeth Overseers* (*k*):—"There being property of which the beneficial occupation is of necessity applicable solely to purposes, whether public or otherwise, from which the occupiers receive no personal benefit, that is not a ground of objection to the property being rateable." Therefore, according to English law, which our Court has heretofore followed in rating cases, *Disney's Case* No. 2 is clearly wrong in deciding that, because the income which the land produced was devoted to trust purposes, the land was exempt from

(*i*) 3 B. & Ad. 573. (*k*) 45 L.J. (N.S.) Mag. Cas. 24.

rating. But it has been suggested that, although the decision may be wrong in stating that the land is exempt from rating, it is right in result, as when the land comes to be valued for rating purposes under our Act, its value must be taken to be nothing. It is said that under sec. 248 of our Act you are to measure value by ascertaining what a hypothetical tenant would give for the property, and as the hypothetical tenant would give nothing for the right to receive an income which he could only apply to trust purposes, the land must be valued at nothing.

Our section provides that the property rateable "shall be computed at its net annual value, that is to say, at the rent at which the same might reasonably be expected to let for from year to year," with certain deductions. The corresponding section of 6 & 7 W. IV., c. 96, provides "that the estimate shall be made of the net annual value, that is to say, of the rent at which the same might reasonably be expected to let from year to year," with certain deductions. As the English section as to mode of assessing value is substantially the same as our own, I consider that the English decisions which establish the proposition that land held for trust purposes is not exempt from rating are decisions showing that such land can be valued for rating purposes. I cannot suppose that a question would have been repeatedly argued and decided, the answer to which would be barren in result, and would establish that land was not exempt from rating which when rated could be valued at nothing. In deciding that the land was rateable English judges must also have decided that it could be valued for rating purposes.

I admit that these decisions do not explain how the difficulty is got over, as to finding what the hypothetical tenant would give where land is held by trustees for public purposes, but it must in some way have been surmounted. In several decisions dealing not with the abstract question of rateability but with the amount at which the property is to be rated, a substantial amount has been fixed where it was perfectly clear that the income of the property was by law devoted to a specific purpose from which the hypothetical tenant could derive no benefit. In the *St. Thomas's Hospital Case*, a hospital established by charter, the revenue of which was to be spent "for the use and maintenance of the poor,

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sick, and infirm," was assessed, taking 10,900*l.* as the rateable value. The governors of the hospital appealed on the ground that the revenue was to be held in trust, and the appeal was dismissed. No difficulty was suggested as to the hypothetical tenant, who, if he were bound by the trust, could not receive anything for his own benefit. In *Corporation of Worcester* v. *Droitwich Assessment Committee* (*l*), all the revenue collected by water rates was to be devoted to the improvement of the supply, and it was said: "The corporation, having in view the benefit of the inhabitants, have made the scale of rates so low as to leave a profit only of 600*l.* upon the rates actually received after deducting the expenses connected with providing the water, collection, etc., upon which amount they contend they ought to be rated." They were rated accordingly. The hypothetical tenant is referred to in the judgment, which must have assumed that he could put this 600*l.* into his pocket, though the corporation were bound to devote it to the improvement of the water supply. To the same effect is the case of *Mayor of Liverpool* v. *Overseers of Wavertree*, reported in a note to the *Droitwich Case*. In *Altringham Union* v. *The Cheshire Lines Committee* (*m*), a railway company governed by private Act of Parliament was assessed for four miles of its lines on the limited profit to which the Act restricted it. It could not be supposed that this four miles of railway could in fact have been let, or that a hypothetical tenant could appropriate to himself the profits of the company.

There is no doubt that the section under which the property is valued has to be strained to meet cases of this kind, and is often difficult of literal application. In the case of *Hackney* v. *Lamberhurst* (*n*), observations will be found as to its extension by analogy to deductions not specified in the section with respect to properties as to which the supposition of a letting in the ordinary sense cannot be applied, and to which the deductions specified in the section are inapplicable. We apply it under our own law to parts of public works for gas supply, water supply, or railway communication.

Applying the section in these cases necessarily involves an assumed alteration of the law under which the property is held.

(*l*) 2 Ex. D., p. 49. (*m*) 15 Q.B.D. 597. (*n*) 1 El. B. & E. 41.

We find a hypothetical tenant for a property which the law does not allow to be let, part of an undertaking which is held as a whole under an Act prescribing how the property is to be used, and who is to use it, and we assume that the tenant can receive and keep what the law would not allow him to obtain. It is no greater departure from fact to assume that the imaginary tenant of land held for trust purposes could apply for his own benefit the income which law requires the trustees to devote to trust purposes. But to my mind a more satisfactory solution of the difficulty is to regard the opening words of sec. 248, "The property shall be computed at its net annual value," as the governing words, and to read the words, "that is to say, at the rent, etc.," as subordinate, and only applicable where the property is of a kind which could be let. Where you cannot apply the test provided by the section for ascertaining net annual value you are not to say that the land is of no annual value, but you must resort to some analogous calculation to ascertain what the value is. It seems to me most unreasonable to relieve land from its liability to rates because you cannot literally apply the section which provides how it is to be rated. It is clear that land held by trustees for public purposes is not intended to be exempt from rating, for in the list of exceptions in sec. 246 of the Act there is an exemption of land held by the Crown for public purposes. It is obvious that the revenues of the trustees of land held for public purposes may be largely increased by roads, lighting, and other local improvements to which they ought to contribute, and yet it has been argued that such land is to go free, because the section under which all descriptions of property are to be rated does not conveniently fit it. This is to defeat the object of legislation by the words intended to define the means by which the object is to be attained, and to treat a difficulty as insuperable which English authorities have effectually disposed of.

I have dealt with the case so far upon principle, not upon the meagre evidence before us; because it was upon the principle laid down in *Disney's Case* No. 2 that the case was decided in General Sessions and was first argued before us. No question arose then as to whether the land did in fact produce an income. I am anxious to dissociate the question of principle from the question

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of evidence. Admittedly we have not to deal with land which, as described in some of the cases, has been struck with sterility, because law has decided that it shall be applied to purposes which can produce no income, or to purposes which produce an income only sufficient to pay the expenses of earning it. In such a case there is no income, or no surplus income, and there is no net annual value and nothing to rate. The principle upon which the present case was decided would apply to a grant where a large income was undoubtedly produced, as, for instance, a grant to trustees of land to be let for agricultural purposes, and the net rents to be held in trust for the maintenance of students at an agricultural college. According to *Disney's Case* No. 2, whatever the amount of the net rents of such land might be, the land could only be rated at 1*s*. Is this, or is it not, the correct view? I hold that it is not. What is the exact effect of the evidence before the General Sessions as to the value of the land here is a doubtful matter and comparatively unimportant. It appears that some evidence of income produced was afforded by a balance sheet of the Agricultural Society from which it might be inferred that income reached the trustees. There was also a statement, the grounds of which were not explained or tested by cross-examination, as to the capital value of the land, taking into account the restrictions of the Crown grant. This was the only evidence by which a definite amount could be arrived at, and was not satisfactory. For this reason I think that the decision of the Court below may be sustained, though the ground on which it proceeded was erroneous.

My brother Williams desires me to add that he concurs in this judgment.

HODGES, J. The only question we have to decide in this case is, Was the decision of the General Sessions right? In my opinion it was. This Court decided in *Disney and Others* v. *The Mayor, etc., of Williamstown* (*o*) that, where land has been reserved for certain public purposes and is afterwards conveyed in fee to trustees for those purposes, the municipal council in estimating the rateable value of such property must take into consideration the

(*o*) 15 V.L.R. 59.

restrictions and conditions in the Crown grant. When the present case came before the Court of General Sessions there was no satisfactory evidence given of the yearly value of this land with all the restrictions in the Crown grant, or that the land with these restrictions was of any value. And as it was admitted that the land was rateable, the only course open to that court was to fix a nominal rate, which it did.

That is all the Court has to decide. And as I do not entirely concur in any of the judgments, and as everything outside the decision will be *obiter*, it seems to me better not to embarrass future argument and the ultimate determination of this question by more *dicta*, though it may be proper to express my opinion in so many words that the language in the judgment of the Court in the case called Disney No. 2—*The Trustees of the Victorian Rifle Association* v. *Williamstown* (*p*)—is not in accordance with the law.

HOOD, J. The matter for our determination in this case is not the liability of the land to be rated, but the amount of the rate that ought to be imposed, the appellants not raising any question as to rateability. Land in this colony, even though it be "struck with sterility," is rateable, and the possibility or impossibility of beneficial occupation can only be considered as an element in arriving at the amount of the rate, and by the *Local Government Act* 1890, sec. 248, is provided the method for arriving at that amount. An annual value of not less than 5*l.* per centum upon the capital value is to be ascertained, and this in every case is a question of fact to be determined upon proper evidence. The annual value which the Act contemplates is the rent which a tenant might reasonably be expected to give from year to year, subject to certain deductions, and in ordinary cases this rent may be estimated with comparative ease. But from time to time exceptional instances have occurred which have presented various difficulties, the chief being in the cases of tramways and gasworks, or cases like the present, where practically the properties cannot be let, and the whole matter then becomes one of theorising and guessing. I doubt if the Legislature ever contemplated these cases when the Act was passed, and the difficulty arises which so often arises of the

(*p*) 16 V.L.R. 251.

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Court having to apply a statutory test or definition to subject-matters to which it is really not applicable at all: See *per* Lord Coleridge in *Smith* v. *Churchwardens of Birmingham* (*q*). However, the difficulty has to be faced, and the courts have done so by imagining an impossible hypothesis. They have created a hypothetical though impossible tenant, and then endeavoured to find out the rent which such a tenant would give, and that is the statutory and judicial interpretation of the words "net annual value": *Smith* v. *Birmingham* (*r*). Then is added a qualification. The tenant is to be a tenant upon the terms peculiar to the property: "It is not reasonable to expect that any rent could be obtained, except such rent as the premises might command, as affected by the statutory conditions, and the possible tenant is to be the tenant of the premises in the state in which the Act says they are to remain": *Owen's College* v. *Overseers of Chorlton* (*s*). "The legal principle is this, you are to take the annual value to be the rent which a hypothetical tenant from year to year would give for it, if he had it upon the same terms as the actual owner has it": *Dewsbury Waterworks* v. *Pennistone Union* (*t*). So that to arrive at the net annual value of the land you must consider it with all its natural and statutory advantages and disadvantages. In the present case the title to the land is one that is not easy to classify under any of the usual headings, and the Crown grant is clogged with various restrictions, all of which materially affect the value of the land. Therefore the substantial question is, What would the property bring in the open market, burdened with the conditions in the Crown grant? In order to arrive at the hypothetical tenant the land must be supposed to be in the market, and then the way to ascertain its value is to say: "There is the land; these are the conditions under which it can alone be occupied; what rent is it reasonable to expect that anyone will give?" In arriving at a determination on this point we ought not to confound the rateable value of the property occupied with the remunerative value to the present occupier: *Reg.* v. *Rhymney Railway Co.* (*v*), as the fact that a profit or a loss arises from the property only constitutes

(*q*) 22 Q.B.D. 703.
(*r*) 22 Q.B.D., at p. 220.
(*s*) 18 Q.B.D., at p. 410.
(*t*) 17 Q.B.D., at p. 387.
(*v*) L.R. 4 Q.B., at p. 283.

one out of many elements in determining its value. We have no concern with beneficial occupation under our law, except so far as it may indirectly induce a tenant to pay rent, while in England if property will let at a rent, it is quite immaterial for rating purposes to inquire what becomes of that rent, or what the landlord may have to do with it when he receives it, and in order to support a rate on the ground of beneficial occupation it is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings, and land occupied by bare trustees is not exempt from rating under this test: *Mersey Docks* v. *Jones* (*w*). But it is obvious that it is one thing to say that property is not exempt from rating, and a totally different thing to say how the amount of the rate is to be arrived at. Land may produce an annual income, and so be capable of beneficial occupation, while at the same time its occupation may be so burdened with conditions and restrictions that it could not be reasonably expected to let at any rent. To arrive at the amount of the rate we have to consider the probable rent which is the test of the net annual value. But value to whom? Surely not to imaginary persons under imaginary conditions. We are obliged to assume a hypothetical tenant, but ought we to assume anything more? Is not the real test of value what the property, as it is, will bring in open competition? "Would the property fetch money in the market if the owner wished to let it? If he could let it only on terms that would give no benefit, no one would occupy. Could the owner find a tenant who would pay him any rent? That depends on the benefit to be derived from the occupation": *Per* Brett, M.R., *West Bromwich School Board* v. *Overseers of West Bromwich* (*x*). So, if by law no one can derive any benefit from the occupation, what is the value of the land? In the present case we have this important element, that the trustees are not to have the handling of any profits, but merely hold the land in trust to allow the society to use it. It is true that the Crown grant speaks of a mortgage over the profits, but I fail to see where the trustees are to get any profits from. They are not to use the land themselves, nor allow any one but the society to use it, and it can hardly be conceived that they are to charge the society for the use of it, and

(*w*) 11 H.L.C. 440. (*x*) 18 Q.B.D., at p. 941.

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at all events, no such power of charging is contained in the grant. The trustees, it is said, by virtue of sec. 137 of the *Land Act* 1890, may make regulations for collection and receipt by them of entrance fees on such land. Assuming for the sake of the argument that this peculiar statutory power would pass to the imaginary tenant, yet no evidence has been given that any such regulations were ever made or any such fees ever received. So that an intending tenant would inspect the Crown grant, and would discover that he could only have the land upon the terms and restrictions mentioned therein. He would find that his position would be that of a trustee only, and that apparently his sole duty would be to hold the property and allow the Agricultural Society to use it. That society might or might not make profit out of its shows held upon the land, but the utmost power which a speculator (suppositious but sane) would possess for recouping himself would be that he might make regulations for charging entrance fees (subject to the approval of the Governor in Council, which might or might not be given). Could any man, under such circumstances, be reasonably expected to pay any rent whatever? Even if the present trustees can be considered as possible tenants, would they pay any rent for land which can only be a burden to them? It is possible that the society itself would be willing to pay a rent, but it is not the tenant, nor is it the person rated, nor could it be, as the property must be vested in trustees to hold upon the terms imposed by Statute and by the Crown grant. The trustees are rated, and the only possible hypothetical tenant must be some person would be willing to take their place and pay rent. The Statute no doubt requires that one should look at all possible tenants: *Reg.* v. *London School Board* (*y*), but they must be reasonable tenants. In my opinion property tied like this is could have no marketable value to reasonable men, and therefore as it must be rated at something, the amount should be fixed at the nominal sum of 1*s*.

It has been said that this point has been impliedly decided against this view by the English decisions. I do not think it has. It was raised, but not decided, in the *Owen's College Case* (*z*), and no one seems to have suggested that the question had been previously decided, and it must be remembered "that the decisions in

(*y*) 17 Q.B.D., p. 738. (*z*) 18 Q.B.D., at p. 407.

these rating cases have been progressive, and that in the earlier cases points which might have been raised and decided were not raised" (*a*). The question for the determination of the Court of General Sessions upon these appeals is the value in the market of the property, considering all the terms and restrictions imposed by law, and this value is to be arrived at upon evidence. The evidence given for the appellants in the Court of General Sessions upon the hearing of this appeal was, in my opinion, founded upon an erroneous basis, totally apart from the point in issue, and was properly disregarded by the learned chairman. We have been informed, however, that he gave his decision following this Court in the case of *The Victorian Rifle Association* v. *The Mayor, etc., of Williamstown* (*b*), and that case has been impugned in this argument. I cannot see that it decides any new principle, or was ever meant so to decide. It seems to me to be the logical conclusion from the previous decision between the same parties (*c*). The first case had decided that in valuing land granted by the Crown to any person or corporate body, the municipal council must take into consideration all the restrictions and conditions of the Crown grant, and the second case merely says that when the restrictions and conditions of that particular grant were so considered the value of the land to any possible tenant was only nominal. That is all that case decides, and decides in my opinion correctly, though there are expressions in the judgment which, taken by themselves, are not strictly accurate.

My conclusion, therefore, is that the decision of General Sessions was correct.

The decision of the Court of General Sessions upheld.

Solicitors for the Town of Essendon: *Malleson, England & Stewart.*

Solicitors for the Trustees of the Royal Agricultural Society: *McKean & Leonard.*

W. H. M.

(*a*) 24 Q.B.D., at p. 209, *per* L. Esher, M.R. (*b*) 16 V.L.R. 251.
(*c*) 15 V.L.R. 59.

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March 17, 31.

DUNTON *v.* DUNTON.

Contract—Good consideration—Undertaking by wife to conduct herself in a respectable, orderly, and virtuous manner.

By a memorandum of agreement, which recited that the parties thereto had been married and that the marriage had been dissolved on the petition of the husband, it was agreed: "Whereas, notwithstanding the said dissolution the said J. D. is desirous of making provision for the said L. D. so long as she, the said L. D., shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in consideration of the premises the said J. D. agrees to pay the said L. D. the sum of 6*l.* per month."

Held, per HIGINBOTHAM, C.J., and WILLIAMS, J. (HOOD, J., *dissentiente*) that the undertaking on the part of L. D. to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, constituted a good consideration to support the agreement to pay the sum of 6*l.* per month.

SPECIAL CASE stated by the judge of the County Court, at Melbourne.

The plaintiff brought an action to recover payment of 6*l.* under an agreement made between the plaintiff and defendant. The agreement was in the following form:—"Memorandum of agreement made and entered into 30th August 1890, between John Dunton and Louisa Dunton, formerly the wife of John Dunton. Whereas the said marriage, had and solemnized between the said John Dunton and Louisa Dunton, was, on the 12th March 1890, dissolved by the Supreme Court upon the petition of John Dunton, and whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in the consideration of the premises the said John Dunton hereby agrees to pay the said Louisa Dunton the sum of 6*l.* per month, from the 1st September 1890, she thereout maintaining and clothing herself; such sum to be payable on the first day in every month during the continuance of this agreement, the first of such payments to be made on the 1st September 1890. Provided always that in the event of the said Louisa Dunton at any time committing any act whereby she or the said John Dunton shall, or may, become subjected to personal hate, contempt, or ridicule, or if the said Louisa Dunton shall not conduct herself with sobriety, and in a respectable,

orderly, and virtuous manner, and with all respect to the said John Dunton, then the said John Dunton may, at his option, immediately cease the payment of the above-mentioned sum, and put an end to this agreement." The question for the consideration of the Full Court was whether this agreement was binding or whether it was *nudum pactum* for want of consideration.

Skinner for the plaintiff—The agreement is not *nudum pactum*, the antecedent relationship of the parties is a good consideration: *Gibson* v. *Dickie* (*a*). The fact that the plaintiff had formerly been the wife of the defendant made it a matter of some concern to the defendant that the plaintiff should lead a respectable and orderly life, so as not to bring his name into disrespect; this itself is a good consideration when the plaintiff undertakes to preserve the good name and fame of the defendant.

Cussen for the defendant—There is no consideration to support this agreement. The words "in consideration of the premises" refer to the recital that the defendant "is desirous of making provision for the said Louisa Dunton;" the first part of the agreement in no way binds the plaintiff to behave herself in the way specified. The latter portion containing the proviso is not a condition binding the plaintiff, but merely a justification for the defendant to cease "making provision." The consideration, if it is one, is too vague, and the Court will not enforce an agreement of this kind. A promise to behave in an orderly and respectable manner is no consideration; it is similar to a promise not to do an unlawful thing, which has been held to be bad in the case of *Jamieson* v. *Renwick* (*b*).

Cur. adv. vult.

HOOD, J. Louisa Dunton sued John Dunton in the County Court to recover the sum of 6*l.* as the amount agreed to be paid by the defendant under a written agreement for the maintenance of the plaintiff. At the trial a question was raised as to whether the alleged agreement was binding upon the defendant, and that question was reserved for the opinion of this Court.

(*a*) 8 M. & S. 463. (*b*) 17 V.L.R. 124.

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The document is called a memorandum of agreement, and apparently was signed by both parties. It recites that they had been married, but that the marriage had been dissolved on the petition of the husband, and it then proceeds as follows:—"And whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in consideration of the premises the said John Dunton agrees to pay the said Louisa Dunton the sum of 6*l.* per month." It then contains a proviso that in the event of Louisa Dunton committing any act whereby she or the said John Dunton may be subjected to hate, contempt, or ridicule, or if she shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all respect to the said John Dunton, then he may put an end to the agreement.

The motive of the defendant in signing this document is clear. He desired to provide for the woman who had been his wife, and who was the mother of his children, in such a way as to induce her not to disgrace herself, him, or them. But the question we have to decide is whether this document constitutes a valid agreement, and we have nothing to do with the motives of the parties except so far as they are expressed in a binding legal document. A man's motives cannot form any consideration for a contract. If this document is to be held binding upon the defendant it must be because there is some legal consideration moving from the plaintiff upon which the defendant's promise is founded. In my opinion the only consideration expressed on the face of the document is the defendant's desire to make provision for the plaintiff, and that clearly would not be sufficient. It was, however, contended that the real consideration is an implied promise by her that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and that the benefit to the defendant would lie in the prevention of the annoyance and disgrace that might be caused to him and his children in the event of the plaintiff misbehaving herself. I cannot imply such a promise from the document, but even if it were expressed therein it would not, in my opinion, constitute a consideration for the defendant's agreement.

A promise in order to be a good consideration must be such as may be enforced. It must, therefore, be not only lawful, and in itself possible, but it must also be reasonably definite. Now, a promise by a woman that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, seems to me to be about as vague a promise as can well be imagined. What are the acts which she is to do or to refrain from doing? What is the meaning to be attached to the words if looked at in the light of a definite promise? A promise by a woman that she will conduct herself with sobriety may mean that she will not drink intoxicating liquor at all, or that she will not get drunk, or it may mean that she may do either so long as she does not do so in public. So with conducting herself in a virtuous manner. Is that in public or in private, and does it include anything short of unchastity? As to respectability and order they are words of such varying meaning that I cannot understand any agreement about them. All this makes me unable to see any promise whatever made by the plaintiff in this document, and in any event forces me to the conclusion that such a promise is too uncertain to form the consideration for any legal agreement. A contract founded upon such an illusory consideration appears to me to be as invalid as a promise by a father made in consideration that his son would not bore him: *White* v. *Bluett* (*c*); and it is not nearly so certain as an agreement by a married woman that she would attend upon her aged father and mother as long as they lived, and provide them with necessary services, and in consideration thereof her father should, when requested, transfer to her his interest in certain land; an agreement which the late Mr. Justice Molesworth considered void for uncertainty: *Shiels* v. *Drysdale* (*d*). It must be remembered that we have not here to consider a case of a plaintiff being induced to alter her position by reason of a promise made by the defendant. The plaintiff does not allege that she did, or refrained from doing, anything depending upon the defendant's promise. If she had stated that she did not get drunk, as she otherwise would have done, or that she remained chaste or orderly or respectable solely in consequence of the defendant's promise, and relying thereon, she might, perhaps, have brought herself under a different rule, but

(*c*) 23 L.J. Ex., at p. 37, *per* Parke, B. (*d*) 6 V.L.R. Eq. 126.

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the very suggestion of such a statement shows to my mind the impossibility of its ever forming the consideration for the contract upon which alone she sues.

For these reasons I find myself unable to concur in the judgment of the Court.

HIGINBOTHAM, C.J. This is a special case by the learned judge of the County Court at Melbourne, under sec. 135 of the *County Court Act* 1890. The question reserved for the opinion of this Court is whether the agreement (Exhibit A) in the action is binding, or is *nudum pactum* for want of consideration. The agreement is in the following terms:—

"Memorandum of Agreement made and entered into this thirtieth day of August 1890, between John Dunton, of Carlton, in the Colony of Victoria, contractor, and Louisa Dunton, of the same place, formerly the wife of the said John Dunton. Whereas the marriage had and solemnized between the said John Dunton and Louisa Dunton was on the twelfth day of March 1890 dissolved by the Supreme Court of the Colony of Victoria, upon the petition of the said John Dunton. And whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in consideration of the premises the said John Dunton hereby agrees to pay the said Louisa Dunton the sum of six pounds per month, from the first day of September 1890, she thereout maintaining and clothing herself, such sum to be payable on the first day of every month during the continuance of this agreement, the first of such payments to be made on the first day of September 1890. Provided always that in the event of the said Louisa Dunton at any time committing any act whereby she or the said John Dunton shall or may become subjected to personal hate, contempt, or ridicule, or if the said Louisa Dunton shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all due respect to the said John Dunton, then the said John Dunton may at his option immediately cease the payment of the above mentioned sum, and put an end to this agreement."

I am of opinion that this agreement is binding, and that it is not *nudum pactum*, or void for want of consideration. It has been contended for the defendant that the written agreement discloses no consideration for the defendant's promise to pay the plaintiff 6*l.* per month, that his promise therefore was a purely voluntary one, and performance of it cannot be enforced by action. The agreement was signed by the plaintiff. The terms of it clearly imply, in my opinion, a promise on her part that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. But

it was said that this was only a promise to do that which the plaintiff was already bound to do, and that such a promise does not constitute a good consideration. It is true that if a person promises not to do something which he cannot lawfully do, and which, if done, would be either a legal wrong to the promisee, or an act forbidden by law, such promise is no consideration for the promise of the other party to the alleged contract founded on mutual promises. The case of *Jamieson* v. *Renwick* (*e*), and the authorities there cited, support that rule. But they also show that a promise not to do, or to do something which the promisor may lawfully and without wrong to the promisee do or abstain from doing, is a good consideration. In the present case the plaintiff was released by the decree for the dissolution of marriage from her conjugal obligation to the defendant to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner; and conduct of an opposite character would not necessarily involve a breach on her part of any human law other than the law of marriage, which had ceased to bind her. She was legally at liberty, so far as the defendant was concerned, to conduct herself in these respects as she might think fit, and her promise to surrender her liberty and to conduct herself in the manner desired by the defendant constituted, in my opinion, a good consideration for his promise to pay her the stipulated amount. I am of opinion, for this reason, that there was a good legal consideration to support this agreement, and I answer the question accordingly. The proper order as to costs of the hearing of this case will be that they abide the event of the action.

WILLIAMS, J. In my opinion there is a consideration for the agreement upon which the plaintiff sues, and it is binding upon the defendant as long as the plaintiff observes her undertaking, necessarily implied in the agreement, that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. The plaintiff signs this agreement and she is bound by it, and the penalty upon her, if she fails to observe her undertaking, is that, immediately she does so fail, all benefit to her under the agreement ceases. The defendant's promise to pay her the 6*l.* per month is stated in the agreement itself to be made "in consideration of the

(*e*) 17 V.L.R. 124.

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premises," and one of those premises is the plaintiff's undertaking to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Then, it is said, this undertaking of hers is nothing, as it only amounts to an undertaking by her to do that which she was under a legal obligation to do. From this proposition I dissent. She was under no legal obligation to the defendant, or to anyone, not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant, or to anyone, not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant, or to anyone, not to allow a paramour to have sexual connection with her. She was entitled in these and other respects to pursue her own course of conduct. Now, turning to the facts as gathered from the agreement and the evidence, it appears that the defendant had obtained a divorce from the plaintiff, and that the issue of their marriage had been five young children, all living at the time the agreement was made. It is true, and it is most important to bear in mind, that with the dissolution of the marriage her conjugal obligations to the defendant ceased. It was, perhaps, by reason of this consequence that the defendant entered into this agreement with the plaintiff and procured her to enter into it with him. It may have been, and probably was, of some moment to the defendant to hold out a substantial inducement to the plaintiff to agree to conduct herself, and to conduct herself in the manner stipulated by himself. She had been his wife, she was so no longer, but she still remained the mother of his five young children. Remaining under no conjugal obligations to him, he probably deemed it advantageous and desirable that she, who remained the mother of his children, should conduct herself in such a way as not to bring discredit upon her offspring. In effect he says to her: "If you, who now owe me no duty as a wife, will agree to my stipulation, I will, so long as you observe that stipulation, pay you 6*l.* per month." Thereupon she signifies her agreement and her assent to observe that stipulation by signing the agreement. The case of *White* v. *Bluett* (*f*) is, in my opinion, not an authority against the view I have taken. In that case, Pollock, C.B., came to the conclusion that the agreement set up by the son was *nudum pactum*, and so no answer to the

(*f*) 23 L.J. Exch., p. 36.

father's cause of action, upon the express ground that the son had no right to complain of the father's distribution of the property; for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do could be no consideration.

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My answer to the question stated is that there is sufficient consideration to support the agreement sued on.

Solicitors for plaintiff: *Lyons & Turner.*
Solicitors for defendant: *Connelly & Tatchell.*

W. H. M.

NIXON *v.* AH FOOK.

F.C. 1892 *March* 22, 23.

Justices Act 1890 (*No.* 1105), *s.* 23, *sub-sec.* (1)—*Service of summons*—"*Place of business.*"

By sec. 23 of Act No. 1105 it is provided that "every summons shall be served at least seventy-two hours before the hearing thereof by a member of the police force or other person upon the person to whom it is so directed by delivering a true copy thereof to such person, or by leaving the same with some other person apparently of the age of sixteen years or upwards for him, at his last or most usual place of abode or of business."

The defendant was charged with having sold lottery tickets. Upon the hearing of the summons the defendant did not appear, and proof was given that a true copy of the summons had been left for the defendant with a person apparently of the age of sixteen years and upwards, at 64 Little Bourke Street, where the defendant had been previously seen employed in the business of selling lottery tickets.

Held, per HIGINBOTHAM, C.J., and HOOD, J. (WILLIAMS, J., *dissentiente*), that such service was a sufficient compliance with the provisions of sec. 23.

Per HIGINBOTHAM, C.J., and HOOD, J. (WILLIAMS, J., *dissentiente*). "Place of business" in sec. 23 is not confined to the place of business belonging to the defendant himself under his control.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of justices at Melbourne, whereby the defendant Ah Fook was convicted on an information charging him with selling a lottery ticket. The defendant did not appear, and proof was given that a true copy of the summons had been left for the defendant with a person apparently of the age of sixteen and upwards at 64 Little Bourke Street, Melbourne, where the defendant had been previously seen employed in selling lottery tickets. The order to review was granted on the

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ground that there was no evidence before the justices that the summons had been delivered to some person apparently of the age of sixteen or upwards at the defendant's last or most usual place of abode or business.

C. A. Smyth to show cause—It was a question of fact for the justices to decide whether the place where this copy of the summons was served was or was not the defendant's last or most usual place of business: *Exparte McEvoy* (*a*).

Forlonge to move the rule absolute—There was no evidence at all that the place where the defendant was served was his place of business. The "place of business" referred to in sec. 23, sub-sec. 1, of Act No. 1105, is the defendant's own place of business, not a place where he is employed by another person.

[HOOD, J., referred to *Blackwell* v. *England* (*b*); *Attenborough* v. *Thompson* (*c*).]

If "business" is to include "employment," then there is no proof that any business was being carried on by the defendant at this place.

Cur. adv. vult.

Counsel subsequently handed up to the Court the following authorities:—*Buckley* v. *Hann* (*d*); *Sangster* v. *Kay* (*e*); *Graham* v. *Lewis* (*f*).

WILLIAMS, J. What becomes of this particular case is comparatively immaterial, but it must be a matter of the greatest moment what construction we place upon sub-sec. 1 of sec. 23 of the *Justices Act* 1890.

"*Audi alteram partem*" is the corner stone of the administration of justice, and, for the purpose of the due observance of this mandate, proceedings have from time to time been prescribed as the means of enabling the person complained against, be it criminally or civilly, to be heard, or to have the opportunity of being heard, if he so

(*a*) 6 V.L.R. (L.) 424.
(*b*) 8 E. & B. 541.
(*c*) 2 H. & N. 559.
(*d*) 5 Ex. 43.
(*e*) 5 Ex. 386.
(*f*) 22 Q.B.D. 1.

pleases. Not to go too far back into past legislation, I may begin with the proceeding of personal service. At one time every summons, whether for a criminal or penal offence, or for a civil proceeding, was required to be personally served upon the defendant. Then, in consequence of defendants in some cases keeping out of the way and taking other means to evade service, upon proof that such was the case power was given to effect substituted service for personal service, but in such a mode as to render it highly probable that the process so served would come to the defendant's knowledge. Then, from time to time, by various provisions introduced into various Acts, modes of substituted service have been provided rendering it less probable that knowledge of the process would be brought home to the defendant; and, finally, we have reached a stage at which the law, instead of providing with reasonable certainty that a defendant shall have the opportunity of being heard, makes it highly probable that in many cases there may be an adjudication of a criminal, penal, or civil nature against a defendant behind his back, and without his having ever heard or known of the institution of proceedings against him. The 23rd section of the *Justices Act* 1890, sub-sec. 1, the sub-section which the Court have in the present case to consider and to put an interpretation upon, is an apt illustration of what I mean. That section prescribes how a summons to answer an information or complaint (a criminal as well as a civil proceeding) may be served, and one of the modes is this—"by leaving the same with some person (other than the defendant) apparently of the age of sixteen years or upwards for the defendant at his last or most usual place of abode or business." This mode is prescribed by the sub-section as a mode for *original* service, the same section proceeding to state that if this mode of original service cannot be effected, a justice may order substituted service to be effected by advertisement or otherwise. Now, construing the words "at his last or most usual place of business" in the manner in which I understand the majority of the Court to construe it, namely, as the place where the defendant is or has been last *employed*, the reasonable certainty of the issuing of the process coming to the defendant's knowledge is secured in the following way:—If an information be laid against A, who is a hand (subordinate or superior) in a large foundry or

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manufactory, good *original* service of a summons to answer that information may be effected by leaving a copy of the summons with any boy apparently of the age of sixteen years (not necessarily either an inmate or apparent inmate, or a fellow employé or apparent fellow employé) who may happen to be at such foundry or manufactory at the time. The bookkeeper in a large firm, the overseer of a factory, the most subordinate hand in a foundry, may in this way be considered to have had good original service effected upon them. This must be the effect of holding "his last or most usual place of business" to mean the place where the defendant has last been, or is, employed, and if this be the law, then the observance of the mandate "*audi alteram partem*" tends to become little better than a farce. For the reasons I have stated, I am not disposed to whittle away, any further than I am forced by authority to do, the just and equitable rule that a defendant who is being prosecuted or sued should have the fact that he is being so prosecuted or sued brought to his knowledge with reasonable certainty. I am glad, therefore, to find that to construe the words "his last or most usual place of business" as meaning the place where he has been last, or is, employed, is opposed to authority, and this brings me to a consideration of the authorities upon the question.

In *Buckley* v. *Hann* (*g*)—which was not a case of service—the question arose—What was the meaning in an Act of of Parliament of the words, "provided the defendant shall carry on his business within the City of London?" and it was held that a clerk in the Admiralty, employed as such in the city, did not carry on business there so as to come within the proviso. In *Sangster* v. *Kay* (*h*)—not a case of service—the same question arose, under the same words in another Act, and it was held that a clerk to the Privy Council was not a person who could be said to "carry on his business" within the meaning of the Act, and that those words meant something more than "employment." It is said that these two authorities have been overruled by the later case of *Exparte Breull, In re Bowie* (*i*), but this is not so, for they were never brought to the attention of the Court, and if *Exparte Breull* is to be considered as overruling the two cases in 5 Exch., much more clearly may it be considered to have been in turn overruled,

(*g*) 5 Exch., p. 43. (*h*) 5 Exch., p. 386. (*i*) 16 Ch. D., p. 484.

and the two cases in 5 Exch. rehabilitated, by the late decision of *Graham* v. *Lewis* (*k*), affirmed on appeal in 22 Q.B.D., p. 1. In *Exparte Breull* the words of the rule were "carry on business," and, in the course of the argument, Lush, L.J., at p. 485, makes the observation, "the rule does not say *his* business." That, again, was not a case of service, and it is needless to observe that the construction of these and similar words may well be stricter when we consider that the object and intention of statutory provisions as to "service" is presumably to affect the defendant with notice or knowledge of the process; as Lush, L.J., in the case of *Exparte Breull* says: "The words in question are susceptible of a wider or a narrower interpretation, and in order to interpret them we must have regard to the object and intent of the rule."

In *Lewis* v. *Graham* (*k*) the same question arose as to whether a clerk employed by a solicitor at offices in the city of London "carried on business" there, so as to fall within the words "carry on business" in an Act of Parliament, and it was held that he did *not* "carry on business" in the city of London. Lord Coleridge in delivering judgment in that case says: "If the question in this case were *res integra*, I should say that it was only where a person is employed in business of his own, carrying on business in the ordinary sense of the words, that the Court has jurisdiction. In a certain sense the defendant was carrying on business, because he was employed in the city; but that is not a fair interpretation of the words; the business must be some business in which he has control, or acts as one of the partners engaged in carrying it on. That would be my opinion if the matter were new, but it is not new." Lord Coleridge then gives as his reason for this statement the two decisions in 5 Exch., cites them with approval, recognises them as authorities, and makes the significant observation that neither of those cases were present to the mind of the Court in *Exparte Breull* in 16 Ch. D., and Mr. Justice Matthews follows Lord Coleridge in very much the same strain. This case of *Lewis* v. *Graham* then went to the Court of Appeal (*l*), which affirmed the decision of Lord Coleridge and Mr. Justice Matthews; Fry, L.J., at p. 5, observing: "I think that the expression 'carry on business' is not ordinarily used in the sense

(*k*) 20 Q.B.D., p. 780. (*l*) 22 Q.B.D., p. 1.

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of a person doing business merely. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion it imports that a person has control or direction with respect to a business, and also that it is a business carried on for some pecuniary gain. If that be so, it is evident that this solicitor's clerk does not carry on business;" and Lopes, L.J., in his judgment, cites the two cases in 5 Exch. with approval. Now, the words of the section we are considering, when expanded, read: "At the last or most usual place of abode of the defendant, or at the last or most usual place of business of the defendant;" and if similar words in Acts providing for matters trivial in comparison with the matter provided for in sec. 23 of the *Justices Act* 1890 are to be given the narrower construction (though capable of a wider) stated in the authorities which I have cited, *à fortiori* should the narrower construction be placed upon these words in a section which is prescribing the means by which a defendant may be presumed to be affected with knowledge of the issue of process against him. The authorities I have cited apply *à fortiori* to the present case, and in my opinion conclude the question. Some of those authorities admit that the words are capable of a wider or narrower interpretation, but hold that we must look to the object and intent of the section in order to ascertain whether the wider or narrower construction is to be applied. In this case I have no doubt whatever that the narrower construction should be applied. Provisions as to original service are, I regret to say, lax and perilous enough; and, for myself, I should be pleased to find some intention on the part of the Legislature in this respect to retrace its latest steps. It is astonishing to find that, in provisions made for the service of summonses on garnishees, it is stipulated that the service shall be "on a person apparently an *inmate* at the last known place of abode or business of the garnishee, and that no place of business shall be deemed to be the place of business of the garnishee unless he be the *master*, or one of the masters, thereof," and that in such a serious and grave matter as that of original service of summonses to show cause against criminal and penal informations the most lax provisions, couched in the most lax and ambiguous language, have been allowed to become law. I think the words "his place

of business," in sub-sec. 1 of sec. 28, mean the place of business of the defendant, the place where he carries on business, and of which he has the control. As, however, the majority of the Court think otherwise, the order to review must be discharged, with costs.

HIGINBOTHAM, C.J. Order to review the conviction on an information charging Ah Fook with selling to one James Cooke a ticket by which permission was given to the said James Cooke to compete in a certain lottery, by which prizes of money were to be competed for by a certain mode of chance within the meaning of the *Police Offences Act* 1890, sec. 37. The defendant did not appear, and proof was given that a true copy of the summons had been left for the defendant with a person apparently of the age of sixteen years and upwards, at 64 Little Bourke Street, Melbourne, on 29th August 1891, where the defendant had been seen employed in the business of selling lottery tickets. The order to review was granted on the grounds that there was no evidence forthcoming before the justices that the summons to answer the information, on which the above conviction was made, had been delivered to some person apparently of the age of sixteen years, for the said Ah Fook, at the said Ah Fook's last or most usual place of abode or business.

The sufficiency of the service of a summons is entirely for the determination of the justices: *Exparte McEvoy* (*m*), but where a special method of service is prescribed by an Act of Parliament, that method must be followed. The *Justices Act* 1890, sec. 23 (1), provides that—

"Every summons shall be served at least seventy-two hours before the hearing thereof, by a member of the police force or other person, upon the person to whom it is so directed, by delivering a true copy thereof to such person himself or by leaving the same with some other person, apparently of the age of sixteen years or upwards, for him at his last or most usual place of abode or of business."

It has been contended by Mr. Forlonge that a lottery shop was not "a place of business" of the defendant, in the absence of proof that it was a place occupied by, and under the control of, the defendant for his own business. I do not think that the expression, "place of business," as it occurs in this section of this Act, fairly admits of the limitation thus proposed to be applied to

(*m*) 6 V.L.R. (L.) 424.

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it. It is an ambiguous expression like "place of abode," and both expressions, as well as similar terms in other Acts and Rules, require to be construed and to be carefully applied in every case in accordance with the object and intent of the Act or Rule in which they occur: See *per* James, L.J., in *Exparte Breull, In re Bowie* (*n*). The defendant was proved to have been occupied or employed at this place in the business of selling lottery tickets, and the place may be properly regarded, therefore, as his place of business, although the business was not his own business.

It is obvious that there is a risk of injustice arising in isolated cases from either of these two methods of original service. Personal service is the only absolutely safe mode of service, but the Legislature has adopted these additional methods with a knowledge of the consequences; and the inconveniences and difficulties attendant upon personal service, which the Legislature sought to remove, would be renewed if we were to apply a limitation of meaning to these expressions, "place of abode," or "place of business," which the ordinary meaning of the terms employed appears to us not to warrant. The order to review will be discharged, with costs.

HOOD, J. The object of the Legislature in passing sec. 23 of the *Justices Act* 1890 was to facilitate the service of a summons and the proof of such service. Personal service would in many cases be difficult, and so it is provided that service may be effected on the defendant by leaving a true copy with some person apparently of the age of sixteen years or upwards at his last or most usual place of abode or of business. It has been contended that a defendant's "place of business" must be limited to cases where the defendant is the master, or one of the masters, of the place. This interpretation would very much cut down the beneficial effect of the section, and would restrict its application to those cases where there would ordinarily be little trouble in serving a defendant in person, inasmuch as if he were the master of the place he ought, as a rule, to be easily discovered. I think that this contention is not correct, and that the words bear their ordinary meaning, and refer to the place where a man is employed in business in the same way as the

(*n*) 16 Ch. D. 487.

preceding words refer to the place where he has his abode, even though he is not master thereof. To read the words otherwise would give the word "his" a different meaning as applied to place of abode from that which it would bear in reference to place of business. His "place of abode" does not mean the place which belongs to him, but the place where he abides. A man living in a coffee palace, hotel, or lodging house, or residing at home with his parents, has his place of abode where he lives, though he is not the master or owner thereof. Even in the case of a man who hired a particular room in a lodging house, it would be very literal language to speak of the room, and not the house, as his place of abode; and to require service on a person at that room would, in most cases, destroy the efficacy of the enactment. So with "his place of business." The pronoun does not imply ownership of the place, or of the business carried on there, but is used colloquially to express the place where the person performs his business. Any uncertainty as to the summons reaching the defendant will arise whatever interpretation is put upon these words, because that uncertainty is caused by the absence of any limitation as to the person apparently of the age of sixteen with whom the summons is to be left. In view of this uncertainty, it seems to me that justices ought to be very particular in requiring strict proof of service when the provisions of this part of sec. 23 are made use of, and the defendant does not appear.

I concur with His Honor the Chief Justice that the rule should be discharged, with costs.

Solicitor for appellant: *Kane.*
Solicitor for respondent: *Guinness*, Crown Solicitor.

W. H. M.

F.C.

1892
March 28.

COUNCIL OF BOROUGH OF HAMILTON *v.* KING SUN.

Water Act 1890 (*No.* 1156), *ss.* 483, 525—*Recovery of rates—Right of council or local governing body to sue in its own name.*

The provisions of sec. 525 of Act No. 1156 which empowers the local governing body to appoint a person to collect and recover rates and charges do not affect or limit the right of the local governing body to sue in its own name under sec. 483 of that Act for the recovery of such rates.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of the police magistrate at Hamilton. In a complaint in which the Council of the Borough of Hamilton were complainants, and James King Sun was defendant, the magistrate made an order against the defendant for the recovery of 11*l.* 14*s.* 6*d.* in respect of water supplied by meter to the defendant by the complainants. The order *nisi* to review this decision was obtained upon the ground that the complainants were not empowered to sue in the name of the council, but that some person should have been appointed by the proper local governing body to collect and recover the amount alleged to be due.

Davis to show cause—By sec. 483 of Act No. 1156 the "Board" is empowered to recover rates and charges; by sec. 517 the term "Board" means "the local governing body;" and by sec. 516 "the local governing body" any town, borough, or shire. There is nothing in the complaint to show that it was not made under sec. 423. By sec. 525, which empowers the local governing body to appoint some person to collect and recover rates and charges, it is expressly provided that nothing therein contained is to affect or limit the power of distress conferred by sec. 483 on the local governing body. The principle that local bodies may sue in their own names is well established: *Reg.* v. *Carr* (*a*); *Kew* v. *Whidycombe* (*b*); *Pinkerton* v. *Heaney* (*c*).

Fisk in support of rule *nisi*—If any effect is to be given to sec. 525, it must be to regulate the powers of the local governing body. That section expressly provides for the procedure to be adopted in this class of case.

(*a*) 1 V.R. (L.) 1. (*b*) 12 V.L.R. 347. (*c*) 15 V.L.R. 392.

HIGINBOTHAM, C.J. The objection to this decision was that the complainant was not empowered to sue, and that some person should have been appointed by the local governing body. We think that the local governing body, that is to say, the Council of the Borough of Hamilton, had power under sec. 483 to sue in its own name to recover this debt. That is quite consistent with the fact that it may also under sec. 525 sue in its own name, although it may be the effect of that section that if it think fit it may appoint some person to collect and recover such debt. In both aspects of this case I think the objection fails, and the order to review must be discharged, with costs.

HOOD, J. I concur in the judgment of the Court, but I do not agree at present with the construction put upon sec. 525.

WILLIAMS, J. All that is necessary for us to decide now is that the council may sue in its own name under sec. 483.

HIGINBOTHAM, C.J. I stated that under sec. 525 the council may have power to sue in its own name. That is my impression, but no doubt in this case the Court merely decides that the council may sue in its own name under sec. 483.

Solicitor for complainant: *Hill.*
Solicitors for defendant: *Hart & Benjamin.*

W. H. M.

[IN CHAMBERS.]

BENNETTS *v.* BENNETTS.

1892
April 5, 6.
Williams, J.

Marriage and matrimonial—Practice—Marriage Act 1890 (*No.* 1166), *s.* 111—***Divorce—Application for payment of money into Court for investigation of petitioner's case.***

Applications under sec. 111 of Act No. 1166, for payment of money for the purpose of enabling the petitioner's proctor to investigate the case on behalf of the petitioner, may be made to a judge in Chambers.

APPLICATION on behalf of the petitioner in a suit for divorce for the payment of money by the respondent to enable the proctor of the petitioner to investigate the merits of the petitioner's case under the provisions of sec. 111 of the *Marriage Act* 1890.

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Williams, J.

The managing clerk of the proctor for petitioner in support of the application.

[WILLIAMS, J. Should not this application be made to the Court?

Moule, amicus curiæ—These applications have always been made upon summons, and no objection has been taken until the case of *Otway* v. *Otway* (unreported), when the objection was taken, and Holroyd, J., considered the objection a good one, but by consent of both parties the matter was heard by the judge sitting as the Court.]

WILLIAMS, J. There seems to be a great doubt as to this point, and I will adjourn the application for the purpose of consulting with the other judges.

WILLIAMS, J. I have consulted two of my brother judges as to this point, and we think it is not free from difficulty, having regard to the interpretation section of this Act, read with sec. 111, under which this application is made. Having reference, however, to secs. 122 and 123, we think, with some doubt, that the former practice may be adhered to, and that the application can be heard by a judge in Chambers. There is a double doubt—whether the application should not be made to the Court, and also whether it should not be made to the judge sitting in divorce proceedings. We prefer to follow the practice which has hitherto prevailed, and I will therefore hear the application.

Proctors for petitioner: *Cleverdon, Westley & Dale.*

Respondent in person.

W. H. M.

[IN CHAMBERS.]

1892
April 8, 11.

Williams, J.

PATERSON *v.* McCARTHY.

Mortgagor and mortgagee—Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6 (*F.*)—*Specially endorsed writ—Action by mortgagee against mortgagor for possession of land—Tenancy created by deed of mortgage—Attornment—Landlord and tenant—Order XIV., r.* 1.

Where, by a mortgage deed, the mortgagor attorns to the mortgagee, the mortgagee is entitled, upon default being made, to specially endorse his writ within the provisions of Order III., r. 6 (F.), for the recovery of the land.

THIS was an application on behalf of the plaintiff for leave to sign final judgment under Order XIV., r. 1.

The writ was endorsed in the following form:—"Statement of claim: The plaintiff's claim is that he is entitled to the possession of all that piece with the appurtenances thereto (land was described). On 11th November 1890 the defendant, by an instrument in writing under the *Transfer of Land Act*, mortgaged the said lands to the plaintiff, and by clause 14 of the said instrument the defendant attorned and became tenant of the said lands with the buildings thereon to the plaintiff from year to year at a yearly rental provided by the said clause and payable as thereby provided, and by the said clause it was agreed by and between the parties that it should be lawful for the plaintiff at any time after default should have been made in the performance or observance of any of the covenants in the said instrument contained or implied and on the part of the defendant to be performed or observed without giving any previous notice or making any demand to enter upon and take possession of the said lands and buildings and to determine the said tenancy created by the said attornment. Default was made in certain of the covenants in the said instrument contained or implied, namely, the covenant contained in the 2nd clause, to pay to the plaintiff on the 7th November and 7th May respectively in each year, interest on the sum of 6,500*l.* or so much thereof as was unpaid, at the rate of 8 per cent. per annum; such default being the non-payment of 266*l.* interest or any part of such on the 7th November 1891, or at all. Default was also made in the covenant to pay rent under clause 14, inasmuch as no payment of

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PATERSON v. MCCARTHY.

Williams, J.

rent has ever been made, and the rent due on the 7th November 1891, namely, 266*l.*, has not been paid, nor has any part thereof. On the 4th March 1892 the plaintiff, by his agent J. P. Turner, entered upon and demanded possession of the said lands, and gave the defendant notice in writing to forthwith quit the said lands, whereby the said tenancy was determined, but the defendant refused and still refuses to deliver up or quit possession of the said lands and remains in wrongful possession thereof. The plaintiff claims: 'Possession of the said lands.'"

The defendant, who appeared to the writ, took the objection that an action of this description could not be made the subject of a special endorsement.

Mitchell in support of the application—This case is exactly covered by the decision in *Daubuz* v. *Lavington* (*a*), where it was laid down that the relationship of landlord and tenant may be created by a mortgage deed, and that claim by the mortgagee against the mortgagor to recover possession of the land may be the subject of a specially endorsed writ within the provisions of Order III., r. 6. That case has been followed in the case of *Hall* v. *Comfort* (*b*), and *Mumford* v. *Collier* (*c*).

Cur. adv. vult.

WILLIAMS, J. An application was made to me in this matter for leave to sign final judgment under Order XIV., r. 1. There was substantially no defence upon the merits, but the question turned upon the construction of Order III., r. 6. It was objected that this case did not fall within the words of the rule: "Actions for the recovery of land with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit." The action in this case was a claim that the plaintiff is entitled to possession of the land upon certain grounds; that default had been made in payment of principal and interest secured by the mortgage, and that default had been made in the covenant to pay rent included in the mortgage.

(*a*) 13 Q.B.D. 347. (*b*) 18 Q.B.D. 11. (*c*) 25 Q.B.D. 279.

The plaintiff claimed possession of the land. Then there was the usual clause of attornment in the mortgage by which the mortgagor attorned as tenant to the mortgagee at a certain rent, that rent being the interest secured by the mortgage. I must say that, if this matter had been *res integra*, I should have said that this action did not come within that class of actions referred to in Order III., r. 6. In the absence of authority I should have been prepared so to decide. My impression certainly is that that rule applied to ordinary cases of landlord and tenant and not to cases of this description. But English cases were cited by Mr. Mitchell which are contrary to this impression. The case of *Daubuz* v. *Lavington* (*d*), which was followed by *Hall* v. *Comfort* (*e*) and *Mumford* v. *Collier* (*f*), decides that an action of this kind may be the subject of special endorsement. I cannot distinguish the present case from those authorities, especially the principal case of *Daubuz* v. *Lavington*, which was the ground for the subsequent decisions. I think, therefore, the best plan is to follow the English decisions, though I do not agree with them or with their reasoning. The summons will therefore be allowed, but I shall make no order as to costs. I will stay execution for three days.

Summons allowed.

Solicitors for plaintiff: *Brahe & Gair.*
Solicitor for defendant: *Little.*

W. H. M.

(*d*) 13 Q.B.D. 347. (*e*) 18 Q.B.D. 11. (*f*) 25 Q.B.D. 279.

1892
April 12.

Williams, J.

[IN CHAMBERS.]

NEW ORIENTAL BANK CORPORATION LIMITED *v.* PETT.

Practice—"Rules of the Supreme Court 1884"—*Order XIV., r.* 1—*Order III., r.* 6—*Specially endorsed writ—Claim for interest.*

A claim for interest at a certain rate on an overdrawn account cannot form the subject-matter of a specially endorsed writ, where there is no allegation that there is a contract, express or implied, to pay such interest at that rate or any other specified rate.

THIS was an application on behalf of the plaintiffs for leave to sign final judgment under Order XIV., r. 1. The statement of claim endorsed on the writ was as follows:—

"The plaintiffs' claim is for the defendant's overdrawn account with the plaintiffs, and interest thereon. Particulars:—

Overdraft	2,825*l.*	7*s.*	8*d.*
Interest thereon from 30th Sept. 1891 to date, at 9 per cent.	141*l.*	4*s.*	8*d.*
	2,966*l.*	12*s.*	4*d.*"

Moule to oppose—The writ is not specially endorsed. It contains a claim for interest at 9 per cent., and there is nothing to show that it arises out of any agreement, express or implied. There is nothing to show that 9 per cent. is the usual rate. The statement of claim on the writ should show how, and upon what contract, the claim for interest is based.

Counsel referred to *Coane* v. *Thomas Bent Land Co.* (*a*).

The managing clerk of the solicitors for the plaintiffs—Upon an overdrawn account there is always an implied contract to pay interest. In a case of *Waite* v. *Power*, referred to in the *Annual Practice* 1892, p. 202, where the claim was partly for money lent, with interest thereon, the Court held that the item for interest, though no express agreement therefor was alleged, did not prevent the writ from being specially endorsed.

(*a*) 17 V.L.R. 198.

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NEW ORIENTAL BANK CORPORATION LIMITED v. PETT.

Williams, J.

WILLIAMS, J. There is nothing to show how this claim for interest arises, and no allegation whether there was any contract to pay interest at 9 per cent. or at any other rate, and I think it cannot, therefore, be claimed on a writ specially endorsed. I dismiss the summons, with 8*l.* 8*s.* costs.

Summons dismissed, with costs.

Solicitors for plaintiffs: *Attenborough, Nunn & Smith.*
Solicitors for defendant: *Alex. Grant & Son.*

W. H. M.

[IN CHAMBERS.]

1892
April 28, 29.

Williams, J.

BANK OF VICTORIA *v.* PERRIN.

Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6—*Specially endorsed writ—Claim for interest under guarantee—Order XIX., r.* 11—*Date of delivery on writ specially endorsed—Order XIX., r.* 4—*Signature to pleadings.*

A claim for interest under a guarantee providing for payment of "usual rate of interest" may be the subject-matter of a specially endorsed writ.

A writ specially endorsed need not have the word "delivered," nor the date of delivery, at the end thereof.

A specially endorsed writ may be signed in the name of a firm of solicitors.

THIS was an application on behalf of the plaintiffs for leave to sign final judgment under Order XIV., r. 1. The statement of claim endorsed on the writ was in the following form:—

"The plaintiffs' claim is against the defendant as surety for 12,919*l.* 16*s.* 3*d.*, for principal moneys lent and advanced by the plaintiff bank to the City of Richmond Coffee Palace Company Limited, by way of overdraft, with interest thereon on the joint and several guarantee of the said defendant and others, dated the 30th day of July 1888. Particulars:—

1891.			
Dec. 31—To amount of overdraft at this date	12,645*l.*	8*s.*	7*d.*
1892.			
April 8—Interest thereon at 8 per cent. per annum	274*l.*	7*s.*	8*d.*
	12,919*l.*	16*s.*	3*d.*

(Signed) MOULE & SEDDON."

The affidavit in support of the application set out the guarantee upon which the defendant was sued. By this guarantee the

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Williams, J.

defendant undertook to pay the amount of the overdraft, upon notice given by the bank, with interest thereon at the usual rate. The affidavit stated that the sum claimed was due and owing. The affidavit used by the defendant did not deny the debt, but stated that several sums had been paid in by the liquidator of the coffee palace, and set out the notice to pay which was given to the defendant by the plaintiffs in September 1891, in which the principal sum of 12,166*l.* 13*s.* 6*d.* was claimed, with interest at the rate of 8 per cent. The judge directed that the plaintiffs should file an additional affidavit, stating whether 8 per cent. was the usual rate of interest, what was the principal now due under the guarantee, and whether sums had been paid into the account by the liquidator of the Coffee Palace Company. An affidavit was accordingly filed, stating that 8 per cent. was the interest agreed upon, and was the usual rate of interest, and that the principal sum due was 12,154*l.* 1*s.* 4*d.*, and no moneys had been paid into this account by the liquidator. It was not stated on the writ that it had been delivered, and did not state date of delivery. There was an endorsement of the date of service in the usual form.

Weigall to oppose—There are several objections to this application. There is a claim for interest, and such claim is not the subject of a special endorsement: *Coane* v. *Thomas Bent Land Co.* (*a*). There is nothing to show that they are entitled to interest at the rate of 8 per cent. Further, there is nothing to show the date of delivery as required by Order XIX., r. 11. This is a fatal objection: *Harris* v. *Moore* (not reported). The writ is a pleading: *Anlaby* v. *Praetorius* (*b*). The writ is signed in the name of a firm, and it should be signed by a solicitor, not by the firm: Order XIX., r. 4.

Moule in support—The interest is claimed under a guarantee, which provides that interest at the "usual rate" may be charged. It clearly arises out of an express agreement, and the amount is merely a matter of proof. A specially endorsed writ need not have the word "delivered" nor the date of delivery at the end of

(*a*) 17 V.L.R. 198. (*b*) 20 Q.B.D. 764.

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the statement of claim: *Veale* v. *Automatic Boiler Feeder Co.* (*c*). The writ is issued according to the form given by the rules. It would be impossible to endorse the date of delivery upon these writs. Order XIX., r. 4, does not apply to specially endorsed writs, and such writs may be signed in the name of a firm.

WILLIAMS, J. I think that in this claim interest is properly claimed, and is payable. The guarantee provides for it. I gave a decision yesterday in *Harris* v. *Moore*, in which I held that a specially endorsed writ should show the date on which it was delivered; in other words that Order XIX., r. 11, applied. I was not referred then to the case of *Veale* v. *Automatic Boiler Feeder Co.* (*c*), and I now think my previous decision was clearly wrong. Hawkins, J., in the case now cited, says:—"The special endorsement on the writ is in place of a statement of claim, and, although it is practically the form to be used where separate statements of claim are made, I do not think it essential that the word 'delivered' should be on the back of the writ. I cannot see any object in having it there. No doubt the date of the issue of the writ should be stated on it before service, but a man knows when a writ is served on him, and if it were necessary to state the date of service before serving it, the process server would have to carry a pen and ink and insert the date at the time of effecting service. He might as well be required to fill up on the spot the memorandum of service. Moreover, one does not speak of delivering a specially endorsed writ, but of serving it. The objection is without substance, and we would be yielding to a technicality if we allowed it." I do not hesitate to say that we have carried technical objections in respect of special endorsements as far as we should go, and I am not disposed to carry them any further. Then it is said that the writ is not signed by the solicitor; it is signed by "Moule & Seddon," and I think that that is sufficient. As to the merits, it appears that there is this sum of 12,154*l.* 1*s.* 4*d.* due as principal, and the guarantee provides for interest at the rate of 8 per cent. The affidavits filed in answer to the application simply say that the defendant has a claim against

(*c*) 18 Q.B.D. 631.

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some co-guarantors. I think, therefore, that the plaintiffs are entitled to judgment for this sum of 12,154*l.* 1*s.* 4*d.*, with interest at the rate of 8 per cent. from the 21st September 1891, when notice was given, up to the date of this application.

Summons allowed, with costs.

Solicitors for plaintiffs: *Moule & Seddon.*
Solicitors for defendant: *Westley & Demaine.*

W. H. M.

F.C.

1891
August 12, 13.
Sept. 7.
1892
Feb. 19, 22, 29.

ROBERTS *v.* BALFOUR.

Vendor and purchaser—Sale of land—Title—Implied obligation to make a good title—Conditions of sale—Excluding liability—No title to portion of land sold—Compensation.

As a general rule, if a person sells real or personal property, representing it as his own, he contracts impliedly, if not expressly, that it is his, and is answerable on the contract to the purchaser, if it turns out that it is not.

But where trustees selling real estate by the conditions of sale provided that they would only enter into the usual covenant that they had not encumbered the property, and that all deeds and documents in their possession might be inspected by the purchaser, but that otherwise the whole burden and expense of procuring evidences of title and any abstract which he might require should rest upon the purchaser, and also provided that objections and requisitions to title should be made within a limited time, and if not so made should be considered as absolutely waived by the purchaser, who should be considered as having accepted title,

Held, that the conditions of sale amounted to an express exclusion of the trustees' implied obligation to make a good title; and that a purchaser, who, having inspected the deeds and documents in the vendors' possession and made no objections to or requisitions on title, and paid the whole of the purchase money, was therefore considered as having accepted title, and was not entitled to relief on the ground that the vendors had no title to a portion of the property sold, the vendors being ignorant of that fact till after the purchase money had been paid and distributed among their *cestuis que trust.*

ACTION by purchaser against vendors of land, claiming damages or compensation in respect of a portion of the land bought, to which vendors could give no title.

By a contract in writing, dated 15th November 1887, the plaintiff William Henry Roberts purchased from John Buchan & Co., as agents for the vendors, James Balfour and William Templeton as

trustees of the will of James Phillips, deceased, for the sum of 1,025*l.*, certain land therein described as "part of Crown suburban allotment 9, parish of Cut-paw-paw, containing 1 acre, 1 rood, $37\frac{1}{10}$ perches, having a frontage to Stevedore Street of 68 feet $11\frac{1}{2}$ inches, and to the Melbourne Road of 147 feet 10 inches, and being irregular in shape."

Among the conditions of sale attached to the contract were the following:—

"5. All deeds and documents in the possession of the vendors relating to the title to the property bought by each purchaser shall be produced to such purchaser or his solicitor for inspection upon his making application for the same to the vendors' solicitors, Messrs. Malleson, England & Stewart, Queen Street, Melbourne, within four days, and the purchaser shall within fourteen days from the day of sale deliver to the vendors' solicitors a statement in writing of all objections or requisitions (if any) to or on the title, and all objections or requisitions not included in such statement shall be considered as absolutely waived, and such purchaser shall be considered as having accepted the title."

"7. If any purchaser shall within the time aforesaid make any requisition upon the title, or abstract or evidence of title, particulars, conditions, conveyance, or otherwise, which the vendors shall be unable or unwilling to remove or comply with (which right of election the vendors absolutely reserve to themselves), the vendors may by notice in writing annul the sale, repay the purchase money, and return the promissory notes."

"8. All abstracts of title attested, and other deeds or documents whatsoever, whether in the vendors' possession or not, which may be required for verifying the abstract or otherwise, and the searching for, production and examination of all deeds and documents not in the vendors' possession, and all covenants for the production of deeds or documents whatsoever, or which may respectively be required, as well under these conditions or otherwise, shall be done and procured by and at the expense of the purchaser requiring the same."

"10. The vendors, being trustees, will only enter into the usual covenant that they have not encumbered the property."

The sale was by public auction, and before and at the time of sale plans of the land were exhibited, showing that the lot was bounded as stated in the contract both by Stevedore Street and the Melbourne Road. The title to the land was under the old system, and all deeds and documents in the possession of the vendors were produced for the plaintiff's inspection, but they showed a complete right in Phillips to the land sold, and the plaintiff made no objections or requisitions on title. After payment of the whole of the purchase money, the plaintiff discovered that in 1870 Phillips had sold all the frontage to Stevedore Street, and executed a conveyance thereof to the purchaser, in whose assigns the title and possession

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were at the time of sale. The vendors sold under the *bonâ fide* belief that the whole of the land belonged to the estate, and were not aware until after they had received the whole of the purchase money and distributed it among the beneficiaries that Phillips had parted with any portion of it.

The purchaser brought the present action for damages or compensation in respect of the deficiency in area of the property.

The arguments sufficiently appear from the judgment of Hood, J.

Topp and *Weigall* for the plaintiff.

Higgins and *Hayes* for the defendants.

Topp in reply.

Cur. adv. vult.

Sept. 7.

HOOD, J. By a contract in writing dated the 15th day of November 1887, the plaintiff, William Henry Roberts, purchased from John Buchan & Co., as agents for the vendors, for the sum of 1,025*l.*, certain land described as "part of Crown suburban allotment 9, parish of Cut-paw-paw, containing 1 acre 1 rood 37$\frac{7}{10}$ perches, having a frontage to Stevedore Street of 68 feet 11$\frac{1}{2}$ inches, and to the Melbourne Road of 147 feet 10 inches, and being irregular in shape." The sale was by auction, and before and at the time of the sale plans were exhibited on the vendors' behalf showing that this lot was bounded both by Stevedore Street and the Melbourne Road, and the plaintiff bought under the belief, induced by the description and the plans, that he was buying land having a frontage to both streets. The vendors were James Balfour and William Templeton, as trustees of the will of James Phillips, deceased, and they received from the plaintiff the whole of the agreed purchase money, and on the 23rd April 1890 they signed a receipt therefor. Shortly after the purchase the vendors' solicitors produced to the plaintiff the title to the property. This title was under the old system, and showed a complete right in Phillips to the land sold, and the plaintiff being content made no objections or requisitions. After payment of the purchase money, but before any conveyance was executed, the plaintiff discovered that, in 1870, Phillips had

sold all the Stevedore Street frontage, and had duly executed a conveyance thereof to the purchasers, in whose assigns the title and possession now remain. Of this fact the executors of Phillips were in ignorance at the time of the sale and receipt of the purchase money, and they sold in *bonâ fide* belief that the whole of the land was theirs to sell.

Under these circumstances the plaintiff commenced this action claiming damages or compensation, and, though not so put in his pleadings, his case was argued upon the principle that a purchaser is entitled to have all that the vendor can convey, with compensation for deficiency, if any, unless there is some condition in the contract to the contrary. To this the defendants say, first, that the rule does not apply in the present case, as they were only trustees selling whatever title they might have. So far as this part of the defendants' contention is concerned, there is no express statement anywhere that they were selling their right, title, and interest only. The contract was made by John Buchan & Co. as agents for the vendor, and the sale was by order of the Trustees, Executors & Agency Company Limited, on behalf of the trustees of the will of James Phillips, deceased, and the only other reference to the position of the defendants is in condition No. 10, which states that the vendors, being trustees, will only enter into the usual covenant, that they have not encumbered the property. There is nothing in this to support the argument that at the time of the sale it was not intended that title should be made. On the contrary, it is clear from the surrounding circumstances and from the contract and conditions of sale that, when they sold, the vendors believed they could give a good title, and intended to do so. The defendants, however, further say that even though they may at the time of the sale have intended to make title, yet they are now relieved from their obligation by reason of the conditions, and especially by condition No. 5. That condition reads thus:— [The learned judge read the condition set out above].

Under this condition, the vendors having produced for the inspection of the plaintiff all deeds and documents in their possession relating to the title, and the plaintiff having made no objection or requisition within the stipulated time, it is contended on behalf of the defendants, that the plaintiff must be taken to

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have accepted the title, whatever it was, and to have waived all objections, no matter what their nature might be. Indeed, it was broadly urged that, even if the deed of 1870 had conveyed away all the land, instead of part only, still the defendants would be entitled to retain the whole of the purchase money and give the plaintiff in return nothing but a valueless conveyance. This seems a startling conclusion, though, of course, if it is the correct construction of the contract, effect must be given to it. But it must be remembered that in cases like these the burden is on the vendor. If he desires to limit the liability under which he usually rests of making good title to the land which he sells, he must do so in terms explicit, plain, and unambiguous: *Ellis* v. *Rogers* (*a*); *Re Marsh and Earl Granville* (*b*). The conditions of sale are prepared by him. He knows, or ought to know, much more of their subject matter than a purchaser usually knows or can know, and where the language which he uses is at all ambiguous, it is always construed in such a way as to prevent the vendor from dealing unfairly with the purchaser: See *Re Terry & White's Contract* (*c*).

Now, does this condition, No. 5, or any other in this contract say plainly or by necessary implication that the vendor is not bound to make title at all unless required to do so within the stipulated time, or is it anywhere conveyed to a purchaser's mind that he may have to pay his money and get nothing for it? I can discover nothing of the sort. The fair interpretation of the contract and conditions, in my opinion, is this. The vendors sell the land, and undertake to make title and give a conveyance. They have in their possession deeds and documents which show good title, and these will be produced. If there is anything wrong with these deeds or documents, the purchaser must make objections and requisitions, and, if he makes any requisition which the vendors are unable or unwilling to remove or comply with, the contract may be annulled. The vendors are bound to make title, but if no objections are made the purchaser may have to accept an infirm title, or possibly merely a possessory one. Beyond this I cannot think that the conditions go, nor can I read them to mean that the purchaser is not to get the land which he bought and paid for, nor any title of any sort to it, but only a mere waste piece of parchment containing idle covenants.

(*a*) 29 Ch. D. 661. (*b*) 24 Ch. D., p. 17. (*c*) 32 Ch. D., p. 28.

It was, however, further urged as an answer to the plaintiff's claim that inasmuch as this deed of 1870 appears to have been registered, the plaintiff could have discovered it for himself, and, therefore, the doctrine of *caveat emptor* applies. The strongest case in support of this view is *Clare* v. *Lamb* (*d*). The question there was, "whether the purchaser, having paid 240*l.* for property to which the vendors had no good title, could recover back that sum." It was held that he could not, as the doctrine of *caveat emptor* applied. Grove, J., in giving judgment, said:—

"If a man goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the buyer can. In that case the rule *caveat emptor* is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells places at the disposal of the buyer such title deeds as he possesses, and under which he claims. The purchaser has full opportunity for investigating the title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase money, by reason of some defect, of which he had no notice at the time."

If the reference in the foregoing extract to the sale of a chattel is intended to imply that in such a case there would be no warranty of title, I should doubt the correctness of the statement: See *Morley* v. *Attenborough* (*e*); *Eichholz* v. *Bannister* (*f*); and so far as it lays down any general rule as to the application of the maxim *caveat emptor*, it is much too wide: *Jones* v. *Just* (*g*). If the decision is to rest upon the ground of inconvenience, I must confess myself unable to understand why it should be deemed inconvenient to make a man refund money received by him upon a consideration which he has failed to perform, to say nothing of the manifest injustice of such a proceeding. But this decision and all others of a similar character (whether they are based, as some are, upon an application of this maxim, or, as others are, and as I think more properly, upon the doctrine of merger) are clearly distinguishable from the present case. They are all cases of defects discovered after completion and execution of the conveyance, and a marked distinction has been drawn between them and cases like this, where

(*d*) L.R. 10 C.P. 334.
(*e*) 3 Ex. 500.
(*f*) 17 C.B. (N.S.) 708.
(*g*) L.R. 3 Q.B. 197.

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the mistake is ascertained before the final act. "Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by *all* the necessary parties, he may recover the purchase money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered": *Sugden's Vendor and Purchaser* (14th ed.), 549. And where there has been only a partial failure of title discovered before conveyance, "a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction": *Johnson* v. *Johnson* (*h*); *Cripps* v. *Reade* (*i*). This view seems to me to apply to the present case, and I accordingly propose to follow it.

Much was said about the possible hardship upon the defendants, if the plaintiff were allowed to recover, inasmuch as the defendants may have distributed the assets of the estate. Even if this were so, and even if they had no remedy over against the persons who have received the assets, still I should say that they must bear the loss. They took upon themselves to sell land as their own to which they had no title, when it was as much open to them as it was to the plaintiffs to search the registry, and as between the two innocent parties it seems to me just that they should suffer. It was also urged in argument that if this objection to title had been taken in time the defendants might have cancelled the contract under the powers given by condition No. 7. In that event they would have had to return the purchase money, and it has not been contended that they desire now, or ever did desire, to get rid of the agreement, or that they could gain anything by so doing.

It was admitted during the hearing that the trustee company had been wrongly joined as co-defendants. They will be struck out, and the plaintiff must pay any extra costs occasioned by the misjoinder, and there will be judgment for the plaintiff against the other defendants, with costs for 100*l.*, that being, in my opinion, a fair compensation for the loss sustained. I have dealt with this case throughout apart from the pleadings, but upon the points raised and argued as the matter proceeded.

(*h*) 3 B. & P. 162. (*i*) 6 T.R. 606.

From this decision the defendants appealed to the Full Court. [*Coram* HIGINBOTHAM, C.J., WILLIAMS and HOLROYD, JJ.].

Higgins and *Hayes* for the defendants appellants—The learned primary judge confounds compensation for deficiency in acreage or quantity with compensation for deficiency in title, and gives compensation in case of a deficiency in title. But it is submitted that where the title is deficient compensation cannot be awarded.

[HOLROYD, J. In this case you have not what is properly called a defective title, but no title at all as to part.]

The description in the contract was a perfect description of the land which the vendors were selling, but there was an error in title. Here the plaintiffs accepted title, and, there having been no fraud, they are thereby estopped. The vendors were in this case not selling their right, title, and interest, if any, but the fee simple, and there was an express condition that the purchaser was within a certain time to ascertain, practically, if there was such a fee simple as he was satisfied with; if not, he was to take objection so that the vendors might see whether or not they would rescind the contract. In a contract for the sale of goods it is assumed that the vendor has title, but in the case of sale of land there is no such thing as a warranty of title, the title to real estate being a matter requiring professional learning: *Want* v. *Stallibras* (*k*); *Clare* v. *Lamb* (*l*). The effect of His Honor's judgment is to read into the contract of sale a covenant for absolute title, but the trustees expressly abstained from so covenanting, and inserted a condition that as they were trustees only they would only covenant that they had not encumbered the property. If the contract had been an open one no doubt the conveyance would include a covenant for title, but in this case the trustees expressly limit themselves from that liability.

[HIGINBOTHAM, C.J. That would equally apply to a deficiency in area.]

No; because clause 11 expressly provides for that. There is no dispute in this case that we did not produce, within four days as provided by condition 5, all the deeds and documents in our

(*k*) L.R. 8 Ex., p. 183. (*l*) L.R. 10 C.P. 334.

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possession. The purchaser, if he had searched the registry, as any ordinary purchaser would do, would have discovered the error, but he refrained from doing that or from making any requisitions or objections to title, and thereby accepted title, and is estopped now from saying that there was no title to part of the land sold: *Soper* v. *Arnold* (*m*).

[HOLROYD, J. In *Palmer* v. *Johnson* (*n*) compensation was awarded for error after conveyance.]

There was a special provision as to it in the contract. The case does not overrule *Besley* v. *Besley* (*o*), which establishes the proposition for which I contend. The latter case was approved of in *Clayton* v. *Leech* (*p*).

[WILLIAMS, J. This part of your argument assumes that the purchaser has taken a conveyance.]

He in effect got a conveyance. He wanted to get a certificate of title. All that was necessary for him to obtain a certificate was the contract and a receipt for the purchase money, for they amounted to an equitable conveyance. The vendors accepted the purchase money and signed the receipt before it was actually due, at the purchaser's express request, and it is submitted that the plaintiff thereby intended to have done with the vendors and not to require a conveyance from them, as it was unnecessary. The purchase money has been distributed by the trustees among the beneficiaries, and it would be just as hard to make the trustees refund the money as to make the purchaser suffer for his own default in not searching the register. Had he done so and made requisitions the trustees might at once have rescinded the contract.

[WILLIAMS, J. I should have thought it necessary that the vendors should have some sort of title on which the purchaser could make requisitions.]

The vendors showed a perfect title in Phillips in all the land, and they further showed that the purchaser might have got a title to the portion sold, inasmuch as the purchaser from Phillips had never used or occupied the land. The clause, too, refers to requisitions not on the title deeds produced, but on the title to the property. Clause 8 shows that some of the title deeds may

(*m*) 14 App. Cas. 429.
(*n*) 13 Q.B.D. 351.
(*o*) 9 Ch. D. 103.
(*p*) 41 Ch. D. 103.

not be in the vendors' possession. Where title has been accepted and something equivalent to a conveyance given, it is too late to object to the title which has been given: *Bruce* v. *Sturt* (*q*). If a contract contains a clause as to compensation, it is assumed to provide for the only kind of compensation to be given: *Ashburner* v. *Sewell* (*r*).

Topp and *Weigall* for the plaintiff respondent—The contention for the appellants amounts to this, that if a vendor, who has in bygone days had a title to land, though he has long since parted with the land, sells it under conditions such as these and produces an old abstract tracing title into himself, the purchaser, if he does not make requisitions or objections, is barred from objecting that the vendor had no title whatever to the property at the time he sold. Such a contention is unreasonable. It is submitted that the true rule is that there is in every contract for the sale of land an implied condition that the vendor has some sort of title to it; though, if there be some blot on it, a purchaser may be bound if he do not make any requisitions. There is a great difference between a defect in title before and after conveyance. Before conveyance the vendor is liable for all defects in title: 2 *Dart's Vendors and Purchasers* (5th ed.), 591. But when the conveyance is executed, being a deed, it merges everything else, and the only remedy is under the covenants: *Ibid* 777. The vendor cannot rescind where he has no title at all: *Bowman* v. *Hyland* (*s*). In such a case all conditions as to requisitions on title, annulling the sale, and waiver of title, do not apply. Nor can a clause, restrictive of time as to when requisitions are to be made, be relied on where there are grave defects to the title not discoverable on the abstract: 1 *Dart's Vendors and Purchasers* (5th ed.), 159. The receipt for the purchase money cannot be said to be equivalent to a conveyance, for the purchaser would, in any case, be entitled to it on payment. The purchaser no doubt intended to bring the land under the Act, but he never intended to give up any right that he had against the vendors; nor was there any consideration for so doing. In any case the receipt was not a deed, and could not merge other remedies like a conveyance. It cannot be said that in ordinary cases

(*q*) 15 V.L.R. 371. (*r*) 1891, 3 Ch. 405. (*s*) 8 Ch. D. 588.

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acceptance of title waives a right to object to defects in title or to a remedy for them, for every conveyance contains a covenant for title. In *Grassmere Estate Co. Limited* v. *Illingworth* (*t*), where there were a chain of sales of a particular estate before the first or any conveyance was executed, and one of the chain of vendors could not give title, it was not even argued that the acceptance of the title by the purchaser from that particular vendor bound him.

[HIGINBOTHAM, C.J. Where trustees are selling, as here, and the contract provides that when they give a conveyance they will not include in it a covenant for further assurance of title, further than their own acts are concerned, does not the acceptance of title, by not sending in requisitions, amount to more than it would in an ordinary case?]

If these trustees provided as trustees selling ordinarily do, that they only sell what right, title, and interest they have, it might be so; but here they only provided that, after conveyance, they were to be free from liability for all encumbrances except those made by themselves.

Higgins in reply—No case has been cited where compensation for a defect in title has been given; the only remedy where there is a defect in title is to annul the contract: *Warde* v. *Dickson* (*v*). In England there is no general registry for all dealings relating to land required by statute, but an abstract is delivered, and that is all a purchaser can see. But in this colony every dealing is registered, and the register is open to the purchaser. In England an acceptance of title is of the title as shown on the abstract, and requisitions and objections are only made thereon: *Warde* v. *Dickson* (*v*); *Boyd* v. *Dickson* (*w*); *Attorney-General* v. *Sitwell* (*x*). Here there is a duty cast on, or an opportunity given to, a purchaser to search the register for himself.

[HOLROYD, J. Is it not a thoroughly colonial practice to provide that only the documents in the vendors' possession shall be produced?]

Yes. Clause 8, which is peculiar to our practice, almost dispenses with the necessity of an abstract, and puts on the purchaser the burden of searching for other deeds.

(*t*) 15 V.L.R. 687.
(*v*) 5 Jur. (N.S.), p. 700.
(*w*) Ir. Rep. 10 (Eq.) 239.
(*x*) 1 Y. & C. Exch., p. 570.

[HIGINBOTHAM, C.J. *O'Shanassy* v. *Littlewood* (*y*) shows that even an acceptance of title in a case where there is a clause like this does not prevent the compensation clause applying for a deficiency in area.]

The reason is given by Holroyd, J., at p. 123, where he says: "Acceptance of title amounts merely to this, that the purchaser thereby binds himself to pay the purchase money and accept a conveyance without getting a better title. It does not strike out of an agreement a clause for compensation."

Cur. adv. vult.

Feb. 29.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HOLROYD, JJ.] This is an appeal from a judgment of Hood, J. The case was argued and determined in the Court below, apart from the pleadings, and it has been presented to this Court in the same form. The plaintiff bought, at a public auction, a piece of land from the trustees under the will of Mr. James Phillips, deceased, and he now claims compensation from the vendors in respect of a portion of the land to which it was found, after the sale and before conveyance, that the trustees had no title. The rule of law on which the plaintiff's claim is founded is well established, and is equally applicable to sales of real and personal property. It is this, that if a person sells property, representing it to be his own, he contracts impliedly, if not expressly, that it is his own, and is answerable on his contract to the purchaser if it turns out that the property is not his own. The application of this rule by courts of equity is also well settled:—

"The rule of the Court," it was observed, in *Barker* v. *Cox* (*z*), "is plain, that if a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand." "In contracts for the sale of real estate an agreement to make a good title is always implied, unless the liability is expressly excluded": *Per* Lord St. Leonards, *Sugden's Vendors and Purchasers* (14th ed.), 16.

It follows as a consequence of these rules that a claim for compensation, such as that now made by the plaintiff, involves the question

(*y*) 10 V.L.R. (L.) 117. (*z*) 4 Ch. D. 469.

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of consideration, and that its allowance or rejection depends upon the true construction of the contract which the parties have entered into between themselves. In the present case the primary judge has held that none of the conditions of this contract says plainly or by necessary implication that the vendors are not bound to make a title at all unless required to do so within the stipulated time, and that the conditions go no further than this, that the vendors are bound to make title, but if no objections are made the purchaser may have to accept an infirm title or possibly merely a possessory one; and he accordingly gave judgment for the plaintiff for 100*l.*, that being, in his opinion, a fair compensation for the loss the plaintiff had sustained. We are unable to concur with the learned primary judge in his view of the nature and the legal effect of the conditions of the contract. The contract was made with the plaintiff, on the 15th November 1887, by the auctioneers, John Buchan & Co., as agents for the vendors. The sale by auction of this and the other properties sold at the same time purported, according to conditions which were read out at the sale, to be by order of "The Trustees, Executors and Agency Company Limited, on behalf of the trustees of the will of James Phillips, Esquire, deceased." By the 10th condition it was provided that—

"The vendors being trustees will only enter into the usual covenant that they have not encumbered the property."

Condition 5 is in these terms:—

"All deeds and documents in the possession of the vendors relating to the title to the property bought by each purchaser shall be produced to such purchaser or his solicitor for inspection, upon his making application for the same to the vendors' solicitors, Messrs. Malleson, England & Stewart, Queen Street, Melbourne, within four days, and the purchaser shall within fourteen days from the day of sale deliver to the vendors' solicitors a statement in writing of all objections or requisitions (if any) to or on the title, and all objections or requisitions not included in such statement shall be considered as absolutely waived, and such purchaser shall be considered as having accepted the title."

By condition 7—

"If any purchaser shall within the time aforesaid make any requisition upon the title or abstract, or evidence of title, particulars, conditions, conveyance, or otherwise which the vendors shall be unable or unwilling to remove or comply with (which right of election the vendors absolutely reserve to themselves), the vendors may by notice in writing annul the sale, repay the purchase money, and return the promissory notes."

We then come to the 8th condition, a very important one. It is in these terms :—

"All abstracts of title attested, and other deeds or documents whatsoever, whether in the vendors' possession or not, which may be required for verifying the abstract or otherwise, and the searching for, production, and examination of all deeds and documents not in the vendors' possession, and all covenants for the production of deeds or documents whatsoever or which may respectively be required as well under these conditions or otherwise, shall be done and procured by and at the expense of the purchaser requiring the same."

These different provisions of the contract must be considered as a whole, and each of them must be taken in connection with the others. We are of opinion that so taken they amount to an express exclusion of the liability of the vendors to the implied obligation to make a good title. The vendors in plain terms say to the purchaser: "We are trustees only, and we must not be presumed, as an ordinary vendor is presumed, to know our title, and we therefore refuse to incur any liability for the acts of anyone, other than ourselves, that may affect the title. We have certain deeds in our possession—whatever title they show you shall have; you must inspect them, and you may make requisitions upon them or upon the title generally within a certain time, and if we are unable or unwilling to satisfy your requisitions we shall be at liberty to rescind the contract and repay you your purchase money. But these deeds may not disclose the state of the title when we became owners. The owner from whom we derive our title may have encumbered or may have sold the whole or part of the property; we do not know that he has done so, but we refuse to give a warranty that he has not done so. You, the purchaser, must search the register if you desire to be satisfied upon this point before you accept title, and you must do it at your own expense; we make no engagement to give you a good title in all events or at all, except so far as the title may be affected by our own acts." The plaintiff and the defendants were both honestly ignorant of the want of title to a part of this land down to the time when the discovery was made in the Office of Titles. At that time the trustees' estate had been wound up, and the purchase money of the land had been distributed. If the case could be considered as one in which one of the two innocent persons must be held liable for the loss and expense necessarily flowing to one or the other of them from a given event, it appears to us that

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the plaintiff, and not the defendants, should be the sufferer. If the plaintiff, on whom, and not on the defendants, the obligation to search the register lay, had made search within the stipulated time, or at all, the defendants could have rescinded the contract and paid back the purchase money before it was distributed. The plaintiff is seeking to be relieved from the alleged stringency of a condition precluding him from taking objection to the title after the expiration of the period expressly limited, and at the same time to deprive the defendants of their right to rescind the contract. The plaintiff subsequently requested the defendants to give him a receipt for the purchase money to enable him obtain a title under the *Transfer of Land Statute*. By so doing the plaintiff did not give up his right to demand a conveyance from the defendants in the possible event of his being unable to obtain a title under the Statute, but he postponed, by the act done at his request, the time at which the trustees would have been completely protected by the conveyance. In both ways the defendants were placed at a disadvantage, and became liable to embarrassment and expense, if not to actual money loss, by the default and the act of the plaintiff, and he, and not they, should bear the consequences. But the question of legal right in this action must be determined by the conditions of the contract, and the judgment appealed from is erroneous, in our opinion, in holding that the contract gives the plaintiff a right to compensation. The appeal will be allowed, with costs. The judgment for the plaintiff will be set aside, and judgment entered for the defendants, with costs.

Solicitors for plaintiff: *Pentland, Roberts & Thompson.*
Solicitors for defendants: *Malleson, England & Stewart.*

A. J. A.

HADDOW *v.* THE DUKE COMPANY NO LIABILITY.

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"The Mining Companies Act 1871" (*No.* 409), *ss.* 54 *and* 56—*Companies Act* 1890 (*No.* 1074), *ss.* 309 (5) *and* 247, *s.* 248—*No-liability company—Non-payment of call—Forfeiture of shares—Call made by unqualified directors—Qualification of directors—Forfeiture of directors' shares—Redemption of shares—De facto directors—Conversion of property—Measure of damages.*

Shares in a no-liability company become absolutely forfeited on the expiration, without payment, of fourteen days from the day on which a call is made payable, and the subsequent redemption of the shares under sec. 56 of *"The Mining Companies Act* 1871" (No. 409), does not vest the shares *ab initio* so as to avoid the forfeiture but merely creates a new right in the shares from the time of redemption.

The articles of association of a no-liability company registered under *"The Mining Companies Act* 1871" (No. 409), provided that the company should be under the management of a board of directors "consisting of five shareholders, each of whom shall hold and continue to be the holder and registered in the books of the company for at least one hundred shares," and provided that certain persons named "shall be the first board of directors of the said company, and shall continue in office until the general meeting of the company to be held in January 1879." That at that meeting "the whole of the directors shall retire from office and five directors be elected to fill the vacancies, and such directors shall continue in office until the next general meeting of the company, when the two members of the board of directors for whom the fewest votes were recorded shall retire from office and the new board of directors shall continue in office until the next general meeting when the three senior members of the said board shall retire from office, and at the next general meeting of the company the two senior members shall retire from office and so on, the three senior members and the two senior members retiring alternately. Provided that any director absenting himself without leave of the board from five consecutive meetings of the directors shall forfeit his office and another director be elected in his place. Provided also that any director may vacate office by sending in his resignation to the manager, and if any director shall resign or refuse to act in his office, or have his estate sequestrated for the benefit of his creditors, or die, or be appointed to any office or place of profit under the company, or be concerned or participate in the profits of any contract with the company, then and in every such case any meeting of the directors at which a quorum shall be present shall have power to appoint any shareholder, not at such time a director, in the place and stead of such director so resigning, refusing, dying, or having his estate sequestrated as aforesaid, until the next general meeting of the company."

"The powers of the directors shall not cease or be suspended so long as the same shall consist of a sufficient number of members to form a quorum."

"Three directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the board of directors."

Held, that the directors who had not paid the calls on their shares at the expiration of fourteen days from the time when they were made payable ceased to be shareholders, and under the above articles ceased to be directors; and the subsequent payment of their calls did not reinstate them as directors.

At the meetings of directors at which the 59th, 60th, and 61st calls were made there was not a sufficient quorum of directors who had paid previous calls within fourteen days of the time when they were made payable, but 400 shares held by

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a shareholder were forfeited for non-payment of those calls, and sold. On action by the shareholder to recover the shares, or in the alternative for damages,

Held, that the calls were badly made and the plaintiff's shares could not, in the absence of any provision in the articles validating the acts of *de facto* as distinguished from *de jure* directors, be legally forfeited.

Held further, that the action was in the nature of an action for conversion of property, and that the plaintiff was entitled to recover 400 shares in the company, if the company could appropriate or purchase and register in the names of the plaintiffs the same, notwithstanding that since forfeiture they had immensely increased in value, but that, failing that, the measure of damages to which the plaintiff was entitled was the value of the shares at the time of forfeiture.

Semble, per WILLIAMS, J., the measure of damages in an action for conversion of property is the value of the property at the time of conversion, unless special damage arising from the wrongful act is proved.

Semble, per WILLIAMS and HOLROYD, JJ., the words "to be" in sec. 248 of the *Companies Act* 1890 (No. 1047), have been inserted by error.

ACTION by Andrew and James Haddow, trading as Haddow & Sons, against The Duke Company No Liability, for an order that the defendant company appropriate or purchase and register in the names of the plaintiffs 400 shares in the defendant company, and a proportionate number of shares in all companies formed by it to work any portion of the land held by it at the time of the alleged forfeiture of the plaintiffs' shares, and to deliver scrip for the same to the plaintiffs, or in the alternative 2,000*l.* damages.

The statement of claim alleged that the plaintiffs purchased 150 shares in the defendant company on the 4th July 1890, and 250 on the 23rd January 1890, from shareholders registered as such in the defendant company. At the time of the purchase all calls on the 150 shares had been paid by the holders, and the plaintiffs continued to pay all calls thereon up to and inclusive of the 59th call; and at the time of the purchase of the 250 shares all calls thereon had been paid up to and inclusive of the 58th call. By the rules of the company the persons from time to time to be appointed directors were required to be shareholders in the company at the time of their election. The directors who made the 59th and 60th and subsequent calls, up to the 22nd March 1890, were incompetent to be elected or to act as directors not having been shareholders at the time of their election, *or when so acting* (*a*). Notwithstanding such incapacity

(*a*) The words in italics were added by amendment at the trial.

the company. on the 22nd March 1890, wrongfully put up for sale, as upon a forfeiture, the shares of the plaintiffs, and there being no bid therefor bought them in, and had since disposed of them to other persons, who were registered as holders thereof to the exclusion of the plaintiffs. Since such exclusion the defendant company had formed various companies to work portions of the land held by it, to a definite interest in each of which the plaintiffs would have had a right had they not been so wrongfully excluded.

The plaintiffs claimed as above.

In giving further particulars the plaintiffs stated that the names of the directors alleged to be incompetent to be elected or to act as directors, were W. J. Barton, J. Du Bourg, E. Morey, and T. Morgan.

By its defence the defendant company denied, or did not admit, the material allegations of the statement of claim, except that it admitted that it sold the shares referred to as forfeited shares, and that the persons purchasing the same had been registered as shareholders in respect thereof.

The reply joined issue.

Regulation 5 of the articles of association provided—

"That the company shall be under the management of a board of directors consisting of five shareholders, each of whom shall hold and continue to be the holder and registered in the books of the company for at least 100 shares, and Alexander Lowenstein shall be the first registered manager of the company, and Martin Loughlin, Josiah Magor, Owen Edward Edwards, Thomas Colgan, and William Nixon shall be the first board of directors of the said company, and shall continue in office until the general meeting of the company to be held in January 1879."

Regulation 15 provided—

"That at the general meeting of the company to be held in the month of January 1879 the whole of the directors shall retire from office and five directors be elected to fill the vacancies, and such directors shall continue in office until the next general meeting of the company, when the two members of the board of directors for whom the fewest votes were recorded shall retire from office, and the new board of directors shall continue in office until the next general meeting, when the three senior members of the said board shall retire from office, and at the next general meeting of the company the two senior members shall retire from office, and so on, the three senior members and the two senior members retiring alternately. Provided that any director absenting himself without leave of the board from five consecutive meetings of the directors shall forfeit his office, and another director be elected in his place Provided also that any director may vacate office by sending in his resignation to the manager, and if any director shall resign or refuse to act in his office, or have his estate sequestrated for the benefit of his creditors, or die, or be appointed to any office or place of profit under the company, or be concerned or participate in the

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profits of any contract with the company, then and in every such case any meeting of the directors at which a quorum shall be present shall have power to appoint any shareholder not at such time a director in the place and stead of such director so resigning or refusing, dying, or having his estate sequestrated as aforesaid, until the next general meeting of the company."

Regulation 16 provided—

"The powers of the directors shall not cease or be suspended so long as the same shall consist of a sufficient number of members to form a quorum."

Regulation 18 provided—

"Three directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the board of directors."

Helm and *Weigall* for the plaintiffs—The company had five directors, three to be appointed in January, and two in July, or *vice versa*. By the rules the directors were to consist of five shareholders, each of whom must hold, and continue to be the holder of, and registered in the books of the company for, at least 100 shares. Three of the directors were necessary to form a quorum. The 60th call was made by a board of directors, of which Barton was one, on the 31st January 1890. Barton had been elected for twelve months, from the 28th January 1889, but his name did not appear in the books of the company as a shareholder until the 12th April 1889, so that he was not a shareholder until three months after he had been elected a director. With regard to Morgan, another director, a call was made on his shares on 14th June 1889, but he did not pay until 9th July. The effect of that non-payment before the 9th July was that, by the *Companies Act* 1890 (No. 1074), sec. 309, sub-sec. 5, the shares were absolutely forfeited, and he ceased to be a shareholder: *King's Birthday Co.* v. *Jack* (*b*); and so lost his seat as a director. The subsequent payment before the day appointed for sale redeemed the shares, but that did not re-seat him as a director, for he did not continue to be the holder of 100 shares as required by the rules. Morgan was elected on the 6th May 1889, until next meeting, on the 19th May 1889, when the retiring directors were re-elected. Du Bourg, another director, who made that call, did not pay the 54th call, due on 14th August 1889, till 13th September, six days after the day that had been

(*b*) 11 V.L.R. 197.

appointed for sale of his shares as forfeited shares. Under these circumstances the directors who made the 60th call had not the proper qualification to act as directors. There is no provision in the rules of this company giving validity to the acts of *de facto* as opposed to *de jure* directors.

Topp and *Barrett* (with them *Purves*, Q.C.) for the defendant—Clause 15 of the articles of association is peculiarly worded, but it is submitted that when once the five directors of the company were appointed at the meeting in January 1879, they continued in office until the next general meeting of the company; the directors were then elected till the next general meeting, and so on, except any one of the matters referred to at the end of the clause occurred. Those are matters particularly enumerated for which the directors shall lose their seats; but the parting with their 100 shares is not included, and is not therefore regarded as a cause of disqualification. It is submitted further that the shareholder may redeem his shares at any time up to the day they are actually sold; the intention to sell on a particular day may be altered by the directors at any time. All the directors who have been impugned were throughout registered on the books of the company as the holders of 100 shares, and that is all that clause 5 of the articles requires. Clause 8 of the 13th schedule of the *Companies Act* 1890 provides for the case of directors selling their shares, and, though the articles of this company are founded on that schedule in other respects, this clause 8 has been expressly left out. Although the company purports to forfeit in respect of the 59th, 60th, and 61st calls, it is quite sufficient if any one of them was a good call. On the 19th July 1889 Bucknall, Du Bourg, Morgan, and Morey were re-elected directors, all their calls then payable having been paid. The 53rd call had been made by the previous board, and the fourteen days had not then expired. Bucknall, Morgan, and Morey did not pay it in time. If the plaintiffs' argument be correct, they ceased then to be directors. But the same board proceeded to make calls 54-59, and, if they were not directors, the calls were nugatory; they were not calls, and no forfeiture for non-payment thereof could take place. On the 31st January 1890 Du Bourg, Bucknall, and Morgan were re-elected. At that time they had paid the last good call. They

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then, with the others, proceeded to make the 60th call, and as the three formed a sufficient quorum, it was a good call.

In any case the plaintiffs are only entitled to recover the price of the shares at the time they were converted: *Benjamin* v. *Wymond* (*c*). They were sold—250 on 22nd March 1890, and 150 on the 19th April 1890—at the price of the call. There was no transaction in the shares from that time till July. If the plaintiffs succeed they should not get costs, as the amendment granted makes an entirely new case.

Helm in reply—After the day advertised for sale of forfeited shares the shares are irredeemable, and no person has authority to bind the company by receiving the amount of the call unless an extraordinary general meeting of the shareholders has authorised it. It is submitted that the plaintiff is entitled to an order that the company should go into the market and purchase 400 shares for the plaintiff. The defendant has not shown the impossibility of so doing. The latest cases show that the measure of damages is the value of the shares at the time of the writ: *Amoretty* v. *City of Melbourne Bank* (*d*); *Peek* v. *Derry* (*e*); which, though overruled by the House of Lords on the main point, is untouched on this.

Cur. adv. vult.

June 24.

WEBB, J. Action to recover from defendant company 400 shares in it, alleged by it to have been forfeited for non-payment of calls, or in the alternative damages for their conversion. The plaintiffs were the holders of the shares in question, which were alleged by the company to have become forfeited for non-payment as to 250 shares of the 59th and 60th calls, and as to 150 shares of the 60th and 61st calls. The sole objection raised by the plaintiffs to the forfeiture is that the directors by whom the 59th, 60th and 61st calls were made were not, at the time of making the calls, qualified to be or act as directors.

The directors present at the meeting on 27th December 1889, at which the 59th call was made, were Messrs. Du Bourg, Morgan, and Bucknall, constituting a bare quorum. As to Du Bourg, it

(*c*) 10 V.L.R. (Eq.) 3. (*d*) 13 V.L.R. 431. (*e*) 37 Ch. D., p. 594.

appears that at a directors' meeting held on 23rd April 1889, he was appointed as director to fill a casual vacancy, pursuant to a power in that behalf in the articles of association. He was then registered as the holder of 100 shares in the company, on which all the calls then due had been then paid. On 19th July 1889, at a shareholders' meeting, the retiring directors, of whom Du Bourg was one, were re-elected, and under this re-election, if at all, Du Bourg held office on 27th December when the 59th call was made. But in the interval, between his first appointment and his re-election on 8th May 1889, the 51st call fell due, and on the 12th June the 52nd call. These were respectively paid by Du Bourg on 6th June and the 2nd July, and it is contended for the plaintiffs that more than fourteen days from the due date of these calls having expired before payment, his shares had become absolutely forfeited, and he had ceased to be, and at the time of his re-election on 19th July 1889 was not, the holder of 100 shares in the company.

Morgan was also re-elected as a director on 19th July 1889. He was then duly qualified, being the holder of 100 shares. On 24th July 1889 the time for payment of the 53rd call expired, and on the 28th August the time for payment of the 54th call. Morgan did not pay these calls until the 4th September, when he paid both. It is contended for the plaintiffs in his case that on the expiration of fourteen days from the due date of these calls his shares became absolutely forfeited, and he thereupon became disqualified to act as a director, and was so disqualified on 27th December 1889, when the 59th call was made.

Bucknall was, at a directors' meeting on 6th May 1889, appointed to fill a casual vacancy until the next general meeting, and at the shareholders' meeting on the 19th July 1889 he was re-elected as a director. But in the interval the 51st call became payable on the 8th May, and the 52nd call on the 12th June. Bucknall paid these calls on 23rd May and 5th July in each case, more than fourteen days after their due date. The 53rd call was due on 10th July, and the fourteen days expired on the 24th July, after his re-election. Bucknall did not pay his call until 2nd August. He therefore is obnoxious both to the objection to Du Bourg and to that to Morgan. The 60th call was made at a directors' meeting on 31st January 1890, which meeting I find as a fact was held after

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the shareholders' meeting, on the same day at which new directors were appointed. The directors present at the making of the call were Barton, Du Bourg, Morgan, and Bucknall. The objection to this call was mainly based upon the contention that the call was made before the general meeting of shareholders at which Barton, Bucknall, and Du Bourg were re-elected, and that it therefore stood in the same position as the 59th call. It was also contended that, their shares having been forfeited, they were incapable of re-election.

The 61st call was made at a directors' meeting on 28th February 1890, at which Barton, Bucknall, and Morgan were present. As to Barton and Bucknall, it is open to the same objections as those made to the 60th call. As to Morgan, it is open to the objection made to him as to the 59th call. As to all these calls the objections resolve themselves into the question whether shares in a no-liability company become absolutely forfeited on the expiration without payment of the call of fourteen days from the day on which the call is made payable; and whether, if so, the subsequent redemption of the shares under sec. 56 of "*The Mining Companies Act* 1871" vests the shares *ab initio*, so as to avoid the forfeiture, or merely creates a new right in the shares from the time of reinstatement.

The question whether an absolute forfeiture accrues on the expiration of the fourteen days, without payment of the call, has been determined by the Full Court in *King's Birthday, etc., Company* v. *Jack* (*f*), overruling *Guthridge* v. *Gippsland Company* (*g*); and *Reg.* v. *McGregor, exparte Wilkinson* (*h*). In that case the present learned Chief Justice, in delivering the judgment of the Court, says, speaking of sec. 52 of "*The Mining Companies Act* 1871":—"The words 'absolutely forfeited' are to be taken, we think, in their literal sense. The share is gone from the owner, who ceases to be a shareholder, at the expiration of the time limited for payment of the call." The question is, therefore, not now open for consideration by me, and I must hold that, upon the expiration of the fourteen days without payment, these various gentlemen ceased to be shareholders in the company.

Then, did the subsequent payment of the calls avoid the forfeiture and reinstate these gentlemen as directors? Taking first the case of Du Bourg on 22nd May 1889, fourteen days from the

(*f*) 11 V.L.R. 197. (*g*) 5 A.J.R. 161. (*h*) 6 V.L.R. (L.) 167.

day on which the 51st call became payable elapsed, and he not having paid that call, his shares became forfeited and he ceased to be a shareholder. On the 6th June he paid the call, and the payment was accepted by the company. There is no evidence that his shares had been advertised for sale, or any time of sale fixed, and when he paid the call he was clearly entitled to redeem his shares under sec. 56 of the Act, and thereupon he again became a shareholder in the company. Then, on the 26th June his shares again became forfeited for non-payment of the 52nd call. He paid this call on 2nd July, and there being no evidence that a day of sale had been fixed, and was then passed by, thereby again became a shareholder, and was such when elected a director on 19th July. Then, on 28th August his shares again became forfeited for non-payment of the 54th call, and he ceased to be a shareholder. On 13th or 14th September he paid that call. It has been argued for the plaintiffs that, inasmuch as the 7th September had been advertised as the day on which it was intended to sell his shares, and that day had passed before he paid the call, the 56th section, giving a right of redemption "at any time up to or on the day previous to that upon which it is intended to sell the share," did not apply, and that he could not legally redeem his shares on the 14th. It is unnecessary for me to deal with this question, as I am of opinion that even if he did legally redeem his shares, that did not reinstate him as a director.

Morgan and Bucknall stand in the same position as Du Bourg. They were both elected on 19th July 1889, and their shares subsequently became, by virtue of the Act, forfeited, for non-payment in due time of the 53rd call. They subsequently, and before the making of the 59th call, paid this call and redeemed their shares.

It has been argued for the defendant company that, even if a director's shares become forfeited by the operation of the Act, he does not thereby cease to be a duly qualified director if he was qualified at the time of his appointment, and it is pointed out that the articles of association of the defendant company do not contain a provision similar to that in article 8 of the 7th schedule to the Act, viz., that the office of a director shall be vacated if he cease to be a shareholder. But this is not the words of the 5th article. "The company shall be under the management of a board of

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directors, consisting of five shareholders, each of whom shall hold, and continue to be the holder, and registered in the books of the company for at least 100 shares." Here, the insertion of the words, "and continue to be the holder," which are not in article 8 of the 7th schedule to the Act, appears to me to render it unnecessary to enact in the articles that a director's office shall be vacated if he cease to be a shareholder. In my opinion, when Du Bourg, Morgan, and Bucknall ceased to be shareholders they ceased also to be directors, and although upon the subsequent redemption of their shares they again became shareholders, nothing short of their re-election as directors could validly put them in that position again.

Then it is said that these gentlemen continued to be directors *de facto*, and that as such they were competent to join in making a call. But this is in direct opposition to several cases decided in this Court, and to the ultimate decision of the Privy Council in *Garden Gully Company* v. *McLister* (i), affirming the judgment of the late Mr. Justice Molesworth. A clause which is found in the articles of association of many companies validating the acts of *de facto* directors, such as article 19 of the 7th schedule to the Act, is not contained in the articles of this company. I therefore hold that the 59th call was badly made, and no forfeiture could follow from its non-payment. I may observe, in passing, that in arriving at this conclusion I treat the 51st, 52nd, 53rd, and 54th calls as well made, no evidence having been given to impeach their validity.

The 60th call was made on the 31st January 1890, at a meeting of directors, at which Du Bourg, Morgan, Bucknall, and Barton were present. Earlier on the same day, at a general meeting of the company, Du Bourg, Bucknall, and Barton had been re-elected as directors, and, so far as appears upon the evidence, there was no valid call overdue and unpaid by either of them. Du Bourg and Barton had not paid the 59th call, the time for payment of which expired on 22nd January, but as I hold that call to be invalid, their non-payment of it did not work a forfeiture of their shares. They were, therefore, duly qualified and duly elected, and were competent to make the 60th call. Morgan was elected a director on 19th July 1889. His shares became forfeited on 24th July for non-payment

(i) 1App. Cas. 39.

of the 58rd call. He, therefore, ceased to be a director *de jure*, and although he afterwards redeemed his shares, there is no evidence of his subsequent appointment as a director. He was, therefore, not competent to act as a director when the 60th call was made. But as a quorum of those then present were competent, this is immaterial, and I hold the 60th call to have been well made.

The 61st call was made on 28th February 1890, at a meeting of directors at which Du Bourg, Morgan, Bucknall, and Barton were present. But, before this, Du Bourg, Morgan, and Bucknall's shares had become forfeited for non-payment of the 60th call, the time for payment of which expired on the 26th February. The 61st call was, therefore, badly made, and no forfeiture could accrue for non-payment of it.

The plaintiffs' shares were forfeited, and sold for non-payment of the 59th, 60th, and 61st calls, and as I hold the 60th call to have been well made, the shares were rightly forfeited and sold. The plaintiffs, therefore fail, and judgment will be entered for the defendant company with costs.

From this decision the plaintiffs appealed to the Full Court [*Coram* HIGINBOTHAM, C.J., WILLIAMS, and HOLROYD, JJ.].

Feb. 23, 24.

Madden and *Weigall* for the plaintiffs appellants—The plaintiffs assert that at the time the calls, for non-payment of which their shares were forfeited and sold, were made, at the time of the forfeiture, and at the time the sale was ordered, certain of the directors necessary to form a quorum had ceased to be directors.

[*Topp* for the defendant company—There is no case made on the pleadings that at the time of sale they were not directors.]

By amendment the plaintiffs alleged that up to the time of trial they continued to be disqualified. Sec. 237 of the *Companies Act* 1890 (No. 1074) provides for the making of calls in a mining company. Sec. 241, replaced as to a no-liability company by sec. 309, sub-sec. 5, provides that any share upon which a call shall be unpaid after the expiration of fourteen days shall thereupon be absolutely forfeited, without any resolution of directors or other proceeding, and when forfeited shall be sold by public auction. Sec. 247 provides that the person to whom a forfeited share shall

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have belonged may redeem the same at any time up to or on the day previous to that upon which it is intended to sell the same, by payment of all calls due thereon and expenses incurred, the effect of which was considered by this Court in the case of *King's Birthday, etc., Co.* v. *Jack* (*k*). Article 5 of this company provides that each director shall hold and continue to hold and be registered in the books of the company for at least 100 shares. The forfeiture was incurred in this case in respect to the 59th, 60th, and 61st calls, and at the time they were made there was not a quorum of directors who had not ceased to hold such number of shares, and therefore ceased to be qualified. The primary judge holds that they were disqualified in respect of the 59th and 61st calls, but comes to the conclusion that they were qualified as to the 60th. It is submitted that he was wrong as to the 60th call. A director under the Statute and under the articles forfeits his seat if he does not pay a call within fourteen days from the day fixed for payment of the call, because his shares are *ipso facto* forfeited. If he pays before the day appointed for sale he gets back his shares, but he does not thereby get back his seat as a director. He has ceased to be a director, and must be re-elected. At the meeting of the shareholders of the company held on the 31st January 1890 three directors were re-elected. Their shares had been forfeited for non-payment of the previous call. A directors' meeting was held, and the 60th call made. Two of those three directors had previously paid their calls, the third had not. A fourth director at that meeting, Du Bourg, though he paid the money representing that call, could not have paid it, for he had not paid any other call since the 54th. The learned primary judge finds that all the calls up to and including the 54th call were good calls. The 54th call was due on the 14th August 1889. On the 28th August, fourteen days after the call was payable, Du Bourg had not paid it, and his shares thereby became absolutely forfeited under the Act. A day was appointed for the sale of those shares, namely 7th September. On the 13th September, six days after it was too late to pay it, he purported to pay it, but the manager who accepted it did so without authority, and the company was therefore not bound. His Honor finds that when the 60th call was made,

(*k*) 11 V.L.R. 197.

d not paid his calls. In fact, we agree throughout with
l judge, except as to Du Bourg, and as to him, while the
dge at first finds that he had not paid the 54th call, he
seems to forget that in dealing with him in regard to the

BOTHAM, C.J. That appears to be so.]
the 61st call was made, Du Bourg and Morgan were still
ualified from sitting as directors, and all their acts as
ince 13th September 1889 were invalid. There was no
certain who of the directors should retire by rotation in
with clause 15 of the articles of association. There was
hich could give directions under the articles as to the
ents for calling a general meeting of shareholders. There
ard which could appoint a day for the sale of forfeited
f the 60th call was a good call, the money paid by the
r the 59th call, which was bad, should have been applied
—it stood to the credit of the plaintiffs against their

nd *Herbert Barrett* for the defendant respondent.

None of the points that have now been argued for the
were put before the Court below. The main argument
primary judge was addressed to the meeting of the
ry 1890, as to which both sides adduced evidence. The
ase was that the rules of the company required that the
hould be shareholders at the time of their resolution
all, and that the 59th call was bad because at the time of
on they were not shareholders. As a matter of fact, at an
evious to the making of the 59th call, they were properly
l were then shareholders. The whole of the argument
ellants depends on the correctness of this proposition,
he day originally intended for the sale of forfeited shares
e no redemption. It is, however, submitted that a com-
llow shareholders to redeem forfeited shares at any time
sale: Secs. 241, 242, 244, and 246-8 of the *Companies*
and further, that the members have the privilege of
hether the company likes it or not, on redeeming their
ny time before they are sold.

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[WILLIAMS, J. Sec. 241 says that the shares shall be absolutel forfeited, unless under sec. 247, before the day appointed for sal they are redeemed. I think it is not a question of what th company says or what the shareholder says, but what the Act says.

The shares are forfeited to the company, who may sell. It ha a right to postpone advertising the sale, and when it has onc appointed a day for sale, it may postpone the sale for a fortnight Sec. 246.

[WILLIAMS, J. The shares must be redeemed at least the da before which the company intended to sell.]

The company may change its intention. Besides, the compan may sell to the shareholder for the amount of the call, and that i in effect what is done; instead of the company buying them i and then selling them to the shareholder they take from th shareholder the amount of the call.

[WILLIAMS, J. Do you notice the words of sec. 248? Ther seems to be some mistake in them. They follow on sec. 247.]

Yes.

[HOLROYD, J. The words "to be" have somehow crept int the section by mistake.]

Yes. The whole object of the Act is to get for the compan the amount of the call. There is no evidence that these share were properly advertised for sale. The only evidence is that the were advertised, not that they were advertised in the *Gazette* o any proper paper.

[WILLIAMS, J. Was the call proved?]

No. The *Gazette* was not put in evidence.

[WILLIAMS, J. If the question had been raised by you afte the evidence was given, it would still have been time to cure it There are many cases which show that if a question as to proof i not taken in the Court below, which if taken might have bee easily cured, this Court will not interfere to give it any effect.]

By virtue of the articles of association of this company, director who at the time of his election does hold 100 shares in the company, does not forfeit his seat if he forfeits those shares Although one rule says that the directors shall continue to hol 100 shares, another rule enumerates the causes for which a directo shall forfeit his seat, and this is not one of them. And if it were

this company might be left without any directors The Act, schedule 13, provides a form of articles of , including one, the 8th, which provides that a director's be vacated if he ceases to be a shareholder. This ad power to depart from that form in framing its rules, so and dropped out that rule, although it retained the ting to directors. That must have been done with some

URIAM. It had been provided already, as pointed out by d judge, by the insertion of the words, "and continue older," in clause 5, so that it was unnecessary to repeat e 15.]

5 and 15 provide that the directors elected shall continue l the next general meeting of the company. The first e claim made cannot be granted, for the company is and was so before the action was brought. As to the damages, the plaintiffs' forfeited shares were sold and ed at 6*d.* a share. They were sold in March and April, idence is that at that time they were practically valueless ket. The proper measure of damages is, it is submitted, t value of the shares at the time they were forfeited, aintiffs might have then gone into the market and them at that amount.

IAMS, J. If you had not converted them, the plaintiffs e sold them in June for 25*s.*]

len—In *Amoretty* v. *City of Melbourne Bank* (*l*), it was he measure of damages is the value at the time of trial.]

jamin v. *Wymond* (*m*), Molesworth, J., held that the ere to be assessed at the time of the improper act.

len—There the wrongdoers were trustees.]

ere constructive trustees only, as they are here.

OYD, J. I do not think you referred us to sec. 211 of the *Act* 1890, which provides that the first directors, at hall continue to be directors until their successors are In terms it is limited to the first directors. Is it o apply to them all?]

bmitted that it applies to all.

V.L.R. 431.

(*m*) 10 V.L.R. (Eq.) 3.

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[HIGINBOTHAM, C.J. Does not that apply only to one case? Where prior to incorporation there are no directors, the company immediately after incorporation may appoint directors until their successors are appointed under the articles.]

The reasoning of the latter part of the section would apply to every case.

Barrett, on the same side—It was contended for the appellants that Du Bourg was not the holder of 100 shares immediately before the meeting of 30th January 1890, because his shares had been advertised for sale for non-payment of the 54th call, and it was subsequent to the date when it was intended to sell them for non-payment of that call when he redeemed them. But it is submitted that the 54th call itself was a bad one. It was made by Du Bourg, Bucknall, Morgan, and Morey, on the 2nd August, payable on the 14th August. But on the 2nd August Morgan, Bucknall, and Morey had (if the plaintiffs' contention is correct), ceased to be directors for non-payment of the 53rd call. The 53rd call was payable on the 10th July 1889, and all shares on which the call was unpaid on the 24th July were absolutely forfeited by virtue of the Act. Morgan paid the 53rd call on 4th September 1889, Morey paid his on the 14th August, and Bucknall, on the 2nd August. Du Bourg had paid his on the 23rd July. Therefore, on the 31st January, when Du Bourg was re-elected, he had paid the last good call.

Madden in reply—The 53rd call was bad because the majority of those who made it had not paid the 52nd call, so that non-payment of the 53rd call did not make a disqualification. The 52nd call was made on 23rd May 1889, payable on the 12th June. On the 26th June, therefore, shares on which it was unpaid were forfeited. It was made by Morey, Morgan, Bucknall, and Du Bourg. Morgan paid in time on the 14th June; Bucknall did not pay till 5th July; Du Bourg did not pay till 2nd July.

[*Barrett*—There is no evidence as to who made the 53rd call.]

The appointment of one of the five directors, Barton, was always bad, because he was originally elected when he was not a shareholder.

PER CURIAM. We have considered the matter discussed immediately before the Court rose, and we are of opinion that it is our duty to accept the view of the facts presented apparently by both parties without objection, and acted upon by the judge in the Court below. The learned judge has stated that in arriving at his conclusion he treats the 51st, 52nd, 53rd, and 54th calls as well made, no evidence having been given to impeach their validity. That was the view of the facts apparently presented by both parties at the hearing, and the learned judge was allowed, apparently without objection, to found his judgment on the assumption that those calls were treated by both parties as having been well made. It is, of course, open to a party who seeks to support a judgment of the Court to resort to the evidence appearing on the face of the case to uphold the legal decision on any ground—to prove that the decision is legal. But it is different where the judge proceeds upon a view of the facts presented by both parties—not sought to be altered by either—and upon which the judgment is founded.

We, therefore, think that we ought to deal with this case on the point dealt with by Mr. Topp, and that we cannot deal with the argument raised by Mr. Barrett, or the counter arguments; that we cannot investigate facts which were not in dispute at the hearing, and review the judgment of the learned primary judge upon facts apparently not presented to him. We think that no question remains (subject, of course, to Mr. Topp's argument), except the question of damages.

Madden—It is said that the company is wound up, though no evidence as to that was given.

[*Topp*—I can, if necessary, give evidence that it was wound up last December twelve months.

HOLROYD, J. Suppose you would have been entitled to a decree for a return of the shares, and suppose there was no evidence before the Court whether it was possible or not, would not the proper course be to direct the shares to be returned, if they could, and to direct a reference to inquire whether they could be returned or not.]

Yes; or damages in the alternative. Inasmuch as we are entitled to the shares, we were, and are, prevented from selling them

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to the best advantage, and as *omnia presumuntur contra spoliatorem* we are entitled to assume that we would have sold them at the very highest value since their conversion. In *McDonald* v. *Rowe* (*n*) the damages given were the value of the shares either at the time of conversion or at the time of the judgment.

[HOLROYD, J. But not at any intervening time.]

In *Amoretty* v. *City of Melbourne Bank* (*o*) the value of the shares at the time of the writ was taken as the measure of damages. In *Hicks* v. *The Commercial Bank* (*p*) the plaintiff was given an option to take their value either at the time of the writ or of the decree. In *Peek* v. *Derry* (*q*) it was held that the value must be ascertained, not at the date of the conversion, but by the light of subsequent events.

[WILLIAMS, J. In *Mayne on Damages* (4th ed.), 364, it is put that it must be the price you would have had to pay for them on or before the day of trial, but not the highest possible price, for that involves that you would have been wise enough to sell them at the top of the market. In *Owen* v. *Routh* (*r*) it was held that the true measure of damages is not the market price at the time of the breach, but the market price at the time of the trial.]

Topp, by permission of the Court—Those cases are all cases between mortgagor and mortgagee, *i.e.*, of express trustees, not as here, of constructive trustees.

[WILLIAMS, J. There is a case of *McArthur* v. *Lord Seaforth* (*s*), in which it was held to be either at the time that the stock ought to have been replaced or the price at the day of trial, at the option of the plaintiff.]

All the cases show that in cases like this the measure of damages is the value of the shares either at the time of conversion or at the time of trial. The evidence is that they were valueless at the time of the conversion, and there is no evidence of their value at the time of the trial.

Madden—Here the defendant is a tort-feasor, and there is a distinction between the measure of damages in a case of contract

(*n*) 4 A.J.R. 134.
(*o*) 13 V.L.R. 431.
(*p*) 5 V.L.R. (Eq.) 228.
(*q*) 37 Ch. D. 541.
(*r*) 14 C.B. 327.
(*s*) 2 Taunt. 257.

neasure of damages in a case of tort: *Shepherd* v.
).

AMS, J. As I read *Mayne*, it seems to be a very moot
her you can recover damages at any time except the
version, even in actions of trover.]
es in this colony are clear.

OTHAM, C.J., delivered the judgment of the Court
HAM, C.J., WILLIAMS, and HOLROYD, JJ.]. The Court
se has intimated its opinion upon the main question
been argued, and it is unnecessary to repeat it.
question upon which it is necessary to deal is the
f damages, and we are of opinion that this is an
which the claim for damages resembles a claim for
r conversion of property. Indeed, it has been so put on
during the case, and treating it in that light, we think
cisions show that in an action for damages for conversion
, the measure of damages is the value of the property at
conversion, unless the party complaining can allege and
ial damages arising from the wrongful act of which he
Now, in this case, the evidence as to damages is very
both as to amount and as to the value of the shares at
es. There is no evidence at all of the value of these
he date of trial, which was in May 1891. There is no
ence of the value of these shares at the precise dates of
or forfeiture. That date was in February 1890, within
imited time after the making of the 60th call. The
earest in point of time to that date is the evidence of the
ese shares on the 6th January 1890, when they are stated
en in the market at 1*s.* offered by the buyer and 2*s.*
the seller, and that higher amount, in the exercise of the
which we possess, we fix as the value of those shares at
f conversion. The plaintiffs will be entitled to 400 shares,
res can be appropriated and transferred to them by the
company, but in the alternative, if that cannot be done,
will be entered for 40*l.*, with costs of the action and the
is appeal.

(*t*) 2 East. 211.

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Appeal allowed. Order defendant company to appropriate or purchase, and register in the names of the plaintiffs, 400 shares in the defendant company, if that can be done. Refer to the Chief Clerk to ascertain and report whether that can be done. If the Chief Clerk report that it cannot, then judgment to be entered for the plaintiffs for 40*l*. Plaintiffs to have the costs of the action and of this appeal and the costs of the reference, the costs of action already paid by the plaintiffs other than the costs ordered to be paid under any order or orders to be refunded.

WILLIAMS, J. I only wish to add on this question of damages that Dr. Madden has argued very strongly that this case is to be treated for the purpose of measuring damages as an action of conversion. I adopt that argument, and in my opinion the measure of damages in such an action is the value at the time of conversion, unless some special damage is shown. That decision is not in conflict with the case of *Amoretty* v. *The City of Melbourne Bank* (*v*), because Mr. Justice A'BECKETT there puts it: "Notwithstanding the form of the plaintiff's complaint, I think the case should be dealt with on the same footing as if the plaintiff had in terms complained of an improper exercise of a power of sale admitted to have been given. The substance of his complaint is an illegal dealing by the mortgagee in that capacity and by virtue of powers possessed as such. On that footing, elements of trust and contract have to be considered which are not present in ordinary actions for conversion of goods, and which justify the adoption of a different measure of damages."

Solicitor for plaintiffs: *Hobday*.
Solicitor for defendants: *Gill* for *H. S. Barrett*, Ballarat.

A. J. A.

(*v*) 13 V.L.R. 431.

DAVEY *v.* WALKER.

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lct 1890 (*No.* 1102), *s.* 73—*Fraudulent preference—Effect of Act on law—Debtor hopelessly insolvent—Knowledge of creditor—Pressure tor—Question of fact—Appeal to Full Court.*

of fraudulent preference is not altered by the *Insolvency Act* 1890 s. 73, and however desperate the circumstances of a debtor may be, although he knows them to be desperate, is not debarred from pressent. If he does exercise real pressure, and payment is made, it is not preference.

tion whether or not the pressure was real pressure operating on the debtor, is a question of fact for the judge who hears the case , and the Full Court will not interfere with his decision, even though spicious circumstances of the case it might have arrived at a different nless it is shown that the learned judge arrived at a wrong or erroision.

by the trustee of the insolvent estate of Thomas W. eeking to set aside a transaction between the insolvent and as amounting to a fraudulent preference under sec. 73 of *ency Act* 1890 (No. 1102).

7 Thomas Walker, the father of the insolvent, sold a store -in-trade to the insolvent, taking as payment his son's y notes. The son continued in business up to three efore the date of his insolvency, which took place on ıst 1890. On the 19th May 1890 the father, who knew on was in monetary difficulties, and was being pressed by s creditors, asked him for payment of the amount then m—200*l.* on the promissory notes, and certain moneys

The father and son then went to the office of the licitor, and in consequence of the interview the solicitor ay prepared a County Court summons against the son to e amount of his indebtedness, 325*l.* On the 20th May as issued, and on the 21st May the son signed a consent nt, and judgment against the son was signed accordingly y. Execution on such judgment was issued, and on the a bailiff of the County Court took possession of the store -in-trade, and on 2nd June sold them to the insolvent's ohn Walker, for 230*l.* On the 21st August the insolte was sequestrated.

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The action was brought by the trustee under such insolvency against Thomas Walker and John Walker, to set aside this transaction as a fraudulent preference. The defendant John Walker did not appear. Evidence for the plaintiff was given, and the defendant Thomas Walker did not call evidence.

Pigott for the plaintiff.

Duffy and *Cussen* for the defendant.

WEBB, J. This is an action by the trustee of the insolvent estate of Thomas W. Walker, to set aside a transaction between the insolvent and his father as a fraudulent preference. The section of the Statute has been referred to, but that section does not alter the law which formerly existed; it is merely an attempt to define what is a fraudulent preference according to the previous law. Upon the evidence in this case, although there may be suspicion and there always is in cases of this kind, the plaintiff has altogether failed to satisfy me that there was a fraudulent preference. The father was entitled to force his son to pay him, or to endeavour to recover his debt in any way. The fact that one creditor knows that his debtor is indebted to a number of other people, who are pressing him, does not disentitle him from also pressing and getting paid if he can. I see nothing here to establish any fraudulent preference. Judgment for the defendant, with costs.

From this decision the plaintiff appealed to the Full Court [*Coram* HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.].

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Higgins and *Irvine* for the plaintiff appellant—Under the *Insolvency Act* 1890 (No. 1102), the question whether an act is done with an intention to defeat and delay creditors or with a view to prefer a particular creditor is not what was the intention of the creditor, but what was the intention of the debtor: *Michael* v. *Oldfield* (*a*). There was no evidence of any real pressure by the father on the son, nor any evidence of pressure which a Court could recognise. The only evidence as to pressure is that, before going

(*a*) 13 V.L.R. 793.

to his solicitor's office, the father demanded payment of his son. It is submitted that, to amount to pressure such as the Court will recognise, the demand must be such that, if the debtor does not comply with it, he will be in a worse position than if he does: *Mackay* v. *Jellie* (*b*). If, in this case, the son had refused the demand he would have been in no worse position than he was by accepting it. It is clearly proved that what was done was to stop his business and deprive him of all his assets. If he had refused to pay, the father could only proceed against him and make him insolvent, as he was made by another creditor shortly after.

[WILLIAMS, J. Is not the rule this, that in every case where pressure is proved, whether that pressure is a sham or not is a question of fact for the judge or jury?]

No matter how great the pressure brought to bear on the debtor may be, if, owing to his position, it could have no effect on him, it is not such real pressure as the Court should recognise. The fact of the debtor in this case consenting to judgment brought him into the Insolvent Court quite as soon as he would have been brought if he had refused to pay: *Mackay* v. *Jellie* (*c*). Where the transaction has taken place within three months of insolvency, it is for the creditor to prove that there was real pressure operating on the debtor's mind. From the facts proved in evidence it was a question of law, and not of fact, whether there was a fraudulent preference: *Hasker* v. *Moorhead* (*d*). That case shows that if a man does an act as here, the necessary consequence of which is to defeat his other creditors, no question is, under such circumstances, ever left to the jury. No matter how strong the pressure may be, it makes no difference unless it makes the act of the debtor an involuntary one; *Exparte Hall, re Cooper* (*e*); *Exparte Halliday, re Liebert* (*f*).

Cussen for the defendant Thomas Walker, respondent, was not called upon.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. The appellant

(*b*) 17 V.L.R. 91.
(*c*) 17 V.L.R.; *per* Holroyd, J., at p. 94.
(*d*) 2 V.L.R. (L.) 160.
(*e*) 19 Ch. D. 580.
(*f*) L.R. 8 Ch. 283.

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in this case has failed to satisfy us that the learned judge was wrong in arriving at a conclusion in favour of the defendant. The plaintiff undertook to prove in this case that a certain judicial proceeding, namely, the signing of judgment, was a fraudulent preference within the 73rd section of the *Insolvency Act* 1890. That judgment was signed on the 21st of May 1890, and it was preceded on the same day by a consent to sign judgment given and signed by the insolvent. The plaintiff had to prove that that was a fraudulent preference. In order to prove that, it was necessary for him to establish that that consent to sign judgment was the voluntary act of the insolvent done with a view—that is, an operative real view—of giving such creditor a preference over the other creditors, and not an act done under genuine pressure by the creditor who is alleged to have been preferred. The law on this case is stated by a most eminent authority on all questions of this kind: Lord Justice Mellish in *Exparte Topham, re Walker* (*g*). He says:—"The principle of the decision in *Exparte Blackburn* (*h*) was that the law of fraudulent preference was not altered by the Act of 1869, and the law before the Act was that, however desperate the circumstances of a debtor were, and although the creditor knew them to be desperate, the creditor is not debarred from pressing his debtor for payment; and if he did so press, and payment was made, such payment was not a fraudulent preference."

The question that was presented on the evidence in this case to the learned judge, and has been argued before us now is, was this a merely voluntary act of the debtor, or was it an act done in consequence of genuine pressure placed upon him by the creditor? The facts of the case were, we think, not free from suspicion, and it may be that we should not have arrived at the same conclusion as the learned judge. The creditor in this case was the father of the insolvent, and the insolvent undoubtedly owed him money—200*l.* on overdue promissory notes given for property sold by the father; also, for alleged advances made by the father to the insolvent. About the 19th May the father—who then knew that the insolvent was being pressed by another creditor, and that he was not able to satisfy his debts—asked for payment from his son, and the father and son proceeded together to the father's

(*g*) L.R. 8 Ch., p. 620. (*h*) L.R. 12 Eq. 358.

ıd in consequence of that interview the solicitor prepared Court summons. On the following day, the 20th May, a issued, and on the day following that, the 21st May, the judgment was signed. Now it is said that under these nces the act which the insolvent was pressed to do was an which the inference could not be drawn that the pressure and genuine, and that the only motive that could have the insolvent's mind was a view to prefer this particular We do not think that the facts support that contention. asks for payment, and he follows up that demand by ing his debtor to his solicitor, who thereupon proceeds gal proceedings, and issue a legal process. That demand onstitutes a certain degree, greater or less, of pressure editor on the debtor; and, I think, it may not be bly inferred that the debtor was then aware that that act a writ would be followed in due course by the ordinary ce of judgment being signed in an action to which there efence, and that if he did not give the consent he would e made insolvent in a shorter time by his father than he y any other of his creditors. He was not in fact made ill the very outside limit of three months.

stain from expressing the opinion that the case is clear. o means clear, but we are not prepared to say that, inion, the learned judge came to a wrong conclusion. lant has failed to satisfy us that the conclusion come learned judge was erroneous.

the other question, the charge of conspiracy, there was at all.

ink the appeal must be dismissed, with costs.

ors for plaintiff: *Williams & Mathews.*

or for defendant: *G. H. R. & A. E. Osborn*, for *Patten*,

A. J. A.

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Sept. 15, 16.
1892
March 3, 4.

SHEPPARD v. PENGLASE.

Married Women's Property Act 1890 (*No.* 1116), *ss.* 3 *and* 4 (2)—*Appeal to Full Court—Question of fact—Purchase in name of stranger—Resulting trust—Purchase in name of wife—Evidence of intention—Married woman—Acceptance of trust—Proof of separate estate.*

An appellant who appeals on questions of fact from the decision of a judge sitting without a jury has to satisfy the Full Court convincingly and conclusively that the inferences of fact which the learned judge has drawn are not only wrong, but entirely erroneous.

Where a purchase is made in the name, not of a stranger, but of a wife or other near relative, there is a presumption that a provision was intended which rebuts the resulting trust to the person who advances the purchase money; but this presumption is only a circumstance of the evidence, and may be rebutted by evidence showing the purchaser's intention when he paid the money.

A wife may be declared to be a trustee of lands for the assignee of her husband's insolvent estate, and ordered to execute transfers and conveyances thereof, without proof that she has separate estate.

APPEAL from a decision of Webb, J.

The action was brought by H. A. D. Sheppard, the trustee of the insolvent estate of Walter Penglase, against the said Walter Penglase and Mary Penglase, his wife, to have it declared that the wife was a trustee of certain lands for the husband, and that they formed a portion of his estate, and for an order directing her to transfer to the plaintiff, as such trustee, the said lands.

Purves, Q.C., *Goldsmith* and *Coldham* for the plaintiff.

J. W. Smith for the defendant Walter Penglase.

Leon and *Isaacs* for the defendant Mary Penglase.

Smith took a preliminary objection that the insolvent was not a proper party to the action, inasmuch as his interest was vested in the plaintiff as his assignee, and cited *Daniel Ch. Pr.* (6th ed.), 167 and 274; *De Golls* v. *Ward* (*a*); *Whitworth* v. *Davis* (*b*); *Weise* v. *Wardle* (*c*); *Le Texier* v. *The Margravine of Anspach* (*d*). There is now no such thing as joining a party to an action of this kind for the purpose of discovery only.

(*a*) 3 P.W. 311 *n.*
(*b*) 1 Ves. & B. 545.
(*c*) L.R. 19 (Eq.) 171.
(*d*) 15 Ves. 159.

Goldsmith for the plaintiff *contra*—The form of action in the present case is a very familiar one under the old equity system: *Smith* v. *Smith* (*e*); *Halfey* v. *Tait* (*f*). The reason is that the insolvent is necessary for the purposes of discovery, and discovery cannot be got from any person not a party.

WEBB, J. That practice is long ago exploded. In *Hasker* v. *Summers* (*g*), a precisely similar case to this, a suit was brought against the wife of the insolvent without joining the husband. I think the objection is a good one. The defendant insolvent has no interest whatever in the property, which has all passed to the assignee. Possibly the insolvent might be made a defendant, if it was alleged that there would be a surplus in his estate, but there is no such allegation here, and he has no interest. Judgment for the defendant, Walter Penglase, with costs.

J. W. Smith, in place of *Isaacs*, then appeared with *Leon* for the defendant Mary Penglase, and the case proceeded.

After hearing evidence and arguments, Webb, J., found that the lands in question were purchased with money of the defendant Walter, and conveyances taken in the name of the defendant Mary, by his direction or procurement, and that the defendant Walter did not thereby intend an advancement or benefit to his wife; and the learned judge gave judgment for the plaintiff and declared that the defendant Mary was a trustee of the lands for the plaintiff as assignee of the insolvent estate of defendant Walter, and ordered her within fourteen days to execute transfers and conveyances thereof to the plaintiff as such assignee, and to do all things necessary for procuring the due registration of such transfers and conveyances, and within the like time to deliver up to the plaintiff all deeds and documents in her possession or control relating to the lands, or any of them—such transfers or conveyances to be settled in Chambers in case the parties differed about the same, and ordered the defendant Mary to pay the plaintiff's costs of suit, and referred to tax, and gave liberty to apply.

(*e*) 3 V.L.R. (Eq.) 2. (*f*) 1 V.L.R. (Eq.) 8. (*g*) 10 V.L.R. (Eq.) 204.

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March 3, 4.

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From this decision the defendant Mary Penglase appealed to the Full Court [*Coram* HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.].

J. W. Smith and *Madden* for the appellant—The evidence, it is submitted, shows that the lands were purchased by the husband with the money which was her separate property, inasmuch as it was the proceeds of the sale of her scrip; but even if any part of such money was the husband's, he paid it for the purpose of her advancement at a time when he was, without the aid of such moneys, perfectly well able to pay all his debts. Further, it was not alleged nor proved that she had separate estate, and therefore she could not be held to be a trustee of the lands for her husband. An acceptance of trust is a contract within the meaning of the *Married Women's Property Act* 1890 (No. 1116), and cannot be entered into by a married woman unless she has separate estate: *Palliser* v. *Gurney* (*h*), approved and followed in *Stogdon* v. *Lee* (*i*); *Surman* v. *Wharton* (*k*); *Chitty on Contracts* (12th ed.), 232; *Cotterill* v. *Curran* (*l*); *The Colonial Bank of Australasia* v. *Kerr* (*m*).

[HIGINBOTHAM, C.J. I think that all the cases you have cited, beginning with *Palliser* v. *Gurney*, followed by *Stogdon* v. *Lee* and *Surman* v. *Wharton*, have been cases in which an action was brought to recover money from a married woman, and there of course the principle would apply. Where proof was not given by the plaintiff, on whom the onus rested, that she had separate estate when she made the contract, the money could not be recovered in the action. But would that apply to an action not to recover money, but to declare that a transaction in which she has engaged is a fraudulent transaction, and to carry out that declaration in the usual mode by ordering her to execute transfers?]

It is submitted that it would. If the burden of the contract had been to do a service, as to go to York, the principle of the cases would equally apply, and if that be so, where the burden of the contract is to become a trustee, there is no reason why it should not apply.

(*h*) 19 Q.B.D. 519.
(*i*) 1891, 1 Q.B. 661.
(*k*) 1891, 1 Q.B. 491.
(*l*) 15 V.L.R. 588.
(*m*) 10 A.L.T. 201.

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BOTHAM, C.J. In the cases of performing a service it
unt to a contract to pay *money* by way of damages
ice were not performed. Sub-sec. 2 of sec. 4 of the
Vomen's Property Act 1890 (No. 1116) provides that a
man shall be capable of entering into and making herself
spect of and to the extent of her separate property on
t. Then it provides that any damages or costs recovered
ll be her separate property, and any damages or costs
gainst her shall be payable out of her separate property
herwise.]
provides that the term "contract" shall include the
of any trust.
BOTHAM, C.J. Could not this action have been brought,
elief sought, prior to the *Married Women's Property*

ied woman could always be a trustee, but her husband
for her breach of trust. The facts given in evidence in
ere all one way. The wife had a comfortable home in
nd was not willing to accompany her husband into the
as it was then, of the Broken Hill country. In order
her to go with him and assist him, he promised her in
ay as he promised the servant whom he thereby induced
ny them, to give her a share in any discovery he might
did make a discovery. When in consequence a company
l, scrip in her name was made out for her share. That
84. Her shares were in November 1886 sold by her
her request, and with the proceeds in December 1886,
ary 1887, these lands were bought.
AMS, J. It has often struck me whether a Court of
appeals on questions of fact, not on motions for new
not gone too far—whether a Court of Appeal ought not
he facts to a greater extent than we are accustomed to

is no doubt that this Court has gone far beyond the
ses in appeals on a question of fact.
BOTHAM, C.J. When the Court is dealing with a decision
ry judge it is often dealing with conclusions from facts,
e liable to regard an opinion expressed on the facts as a

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finding of fact. I think there are authorities that go to the full extent that where there is a plain finding of a judge on a question of fact it is not to be disturbed by the Court of Appeal except in such cases as it would be in a jury case.

WILLIAMS, J. I think I can find very many cases in which it is stated that on appeal the finding of the primary judge on a question of fact is not in the same position as the finding of a jury.]

If the Court thinks the evidence is not sufficiently strong we would ask for a new trial, as the matter can be proved beyond the possibility of doubt. Where a purchase is made in the name of a wife, or other near relative, there is a presumption that a provision was intended which rebuts the ordinary presumption of a resulting trust to the person advancing the purchase money: *Lewin on Trusts* (8th ed.), 163, 170. The money was expended by the husband in building on the land at the time when he was perfectly able to pay all his debts from other money.

Goldsmith and *Coldham* for the respondent—The defence throughout set up has been that these lands were purchased out of the wife's separate estate. The defendant thereby undertook to prove the affirmative, and she cannot now object that the plaintiff did not prove the negative of that proposition. The whole question was one of fact. The plaintiff put the husband in the box. The wife went into the box for herself. The two stories were in part contradictory, and the learned judge came to the conclusion that the whole story was an improbable one. It was put, and is put now, that there was a contract between husband and wife as to services to be rendered by the wife to the husband. At common law no such contract could be entered into between husband and wife, nor can any such be entered into since the *Married Women's Property Act*, unless the wife has separate estate. They therefore rely on a contract which was not enforceable unless the wife had separate estate. The deeds themselves state the consideration as natural love and affection. In the box the husband and wife both said that that was untrue, that the consideration was the wife's services. The learned judge did not believe them. Money regarded between husband and wife as hers, laid out in land, cannot be

from the husband's creditors: *Smith* v. *Smith* (*n*). The dge's form of order as to costs follows *Scott* v. *Morley* (*o*). l of 1886, when the shares were sold, the money thereby lid not belong to the husband, but vested in the assignee previous insolvency. When he got his release, on paying e *l.*, the money became his, subject to any advancement ade to his wife. So that it comes back to a question of ner there was an advancement to his wife, which the dge decided in the plaintiff's favour.

n in reply—An insolvent who has not obtained his has a right against all the world, and may deal with his s he pleases, as long as his assignee does not step in: *North Hurdsfield United Co.* (*p*). If at the time transferred to his wife the estate was not in him, after nen he got his certificate, he acquired the estate and d the estoppel in favour of his wife: *McVea* v. *Pasquin* (*q*).

Cur. adv. vult.

BOTHAM, C.J. This is an appeal from the judgment of Mr. Justice Webb, whereby it was declared that the Mary Penglase was a trustee of the lands mentioned atement of claim for the plaintiff as assignee of the estate of the defendant Walter Penglase (husband of glase), and it was ordered that the first-named defendant xecute transfers and conveyances of the lands to the s assignee. This judgment was founded on the findings the learned judge, that the lands in question were with money of the defendant Walter, and conveyances he name of defendant Mary, by his direction or procure- d that defendant Walter did not thereby intend an ent or benefit to his wife.

nds were situated at Essendon and Richmond. They hased by the husband Walter, at the end of the year the beginning of 1887. He was then, although an ated insolvent, possessed of large means derived from

L.R. (Eq.) 2.
B.D. 120.
(*p*) 8 V.L.R. (M.) 5.
(*q*) 8 V.L.R. (L.) 347.

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successful mining at Broken Hill. He paid the purchase money, amounting to 970*l.* 12*s.*, by cheques drawn on his own banking account, and he caused the transfers and conveyance to be made to his wife. In 1887, at the request as he stated of his wife, he built a house on the Essendon property at a cost of between 5,000*l.* and 6,000*l.*, and he paid that sum out of his own moneys. In October 1888 he obtained a release from his creditors under the first insolvency, their claims being paid in full. He became insolvent a second time on 18th July 1889, and the trustee of his estate, who is also his principal creditor, sues in this action to recover possession of the lands as property purchased with the moneys of the husband for his own benefit, as his wife well knew, and with her consent, and as now held by her as trustee for her husband. Judgment was given for the defendant Walter Penglase, with costs, on the ground that he was not a necessary or proper party to the action.

The defences set up by the wife, Mary Penglase, were, first, that the lands were bought with money which was her separate property and secondly, assuming that the purchase money or any part thereof was the money of her husband, that he was at the times of purchase able to pay all his debts without the aid of the said lands or purchase money, and that he paid these moneys for her advancement. The evidence of the facts of the case was that of the defendants the husband and the wife. They are not entirely consistent with themselves or with one another in their narratives of the facts. The question which we have to determine on this appeal is, whether the appellant has satisfied us convincingly and conclusively that the inferences of fact which the learned judge has drawn from the evidence are not only wrong but entirely erroneous. See as to this general principle of judgment in appeals on findings of fact in all the jurisdictions of the Court: *Allen* v. *Quebec Warehouse Co.* (*r*) following *Gray* v. *Turnbull* (*s*); *Koebcke* v. *Middlemiss* (*t*) *Re Wolff* (*v*); *Re Will of David Piggott* (*w*).

The husband Walter Penglase stated that he was at Broken Hill in 1884; that he was one of four lessees of land there,

(*r*) 12 App. Cas. p. 104.
(*s*) L.R. 2 Sc. & D. App. 54.
(*t*) 11 V.L.R. 472.
(*v*) 1 V.L.R. (I.) 21.
(*w*) 17 V.L.R. 455.

the interest in which was represented by scrip signed by him for 20 shares; that in pursuance of a promise he had made to his wife, who had refused at first to accompany him to Broken Hill, he gave one scrip for 1-20th interest in the land to her; that he gave another scrip of the same value to his son, and a third scrip to a servant, Miss Carson, to whom he paid from 950*l.* to 1,000*l.* in cash and by cheque, for which she gave a receipt. This receipt was not produced. A company was afterwards formed in which the husband was entitled to 28,000 shares for himself, in addition to 4,000 shares each for his wife and son. All of these shares were issued to the husband in his own name. From the first to the last he treated them and the proceeds of them as his own. He stated that the gift to his wife and the gift to his son stood on the same footing, and that they were both absolute gifts of 1-20th share each. The father describes the gift to his son as having been paid by him in full by its investment in the purchase of property in Gippsland; but he admits that the title of the property may have been in his own name, and he undoubtedly mortgaged it, and he finally inserted it in his schedule as his own property. He stated that he paid his wife no money except by purchasing the properties in Essendon and Richmond. He paid the deposit and the balance of the purchase money of those properties out of his own banking accounts. The contract for the purchase of one of them was made in his own name. The consideration stated in the transfer to the wife, "in consideration of the natural love and affection held by him towards his wife," he now declares to be untrue. He continued to deal with those properties after purchase and registration in the name of his wife, in most respects as if they were his own. In addition to erecting buildings on one of them, he deposited the deeds in a bank and opened an account, on which he received a large advance, and when the advance was paid off he re-deposited them in another bank, and he opened another account in the joint names of himself and a creditor. This evidence and the distinct admission of this witness that he had throughout treated the shares of his wife and son as if they were his own, warranted, in our opinion, the conclusion, either that the promise alleged to have been given by the husband to the wife was never given, or, if given, was never fulfilled, and that the

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lands in question were purchased with the money of the husband and not with money which was, or was supposed by either of the parties to be, the separate property of the wife.

In support of the second and alternative defence, reliance was placed upon the rule of law that where a purchase is made in the name not of a stranger, but of a wife or other near relative, there is a presumption that a provision was intended, and that this presumption rebuts the resulting trust to the person who advances the purchase money. This presumption is only a circumstance of evidence, and evidence is admissible to rebut the presumption, and to prove what was the intention of the purchaser at the time the purchase money was paid: *Devoy* v. *Devoy* (*x*). In this case the presumption was effectually displaced by the only case presented and sworn to by both the husband and the wife, namely, that these lands were bought with the proceeds of the wife's shares, which were in no sense the husband's money, and also by the evidence that the husband dealt with the property as his own after the alleged advancement. The same evidence that warrants the conclusion that the money was not the separate property of the wife warrants, in our opinion, the further finding that the husband invested this money in the purchase of the lands, and subsequently the larger sum, which was undoubtedly his, for his own purposes, and not for the benefit or advancement of his wife.

The appellant has wholly failed to satisfy us that the inferences of fact drawn by the primary judge are entirely erroneous, or that the judgment should be rescinded and set aside on the ground that it is against evidence or the weight of evidence.

It was also contended that, assuming the wife to be a trustee of this land for the husband, the transaction was "an acceptance of trust," and consequently a "contract" within sec. 3 of the *Married Women's Property Act* 1890, and that as no evidence was given that the defendant Mary Penglase had separate property at the time the contract was made, she could not, according to recent English decisions upon sec. 4 (2), be the subject of an obligatory judgment. But the decisions referred to only determine that where damages or costs are recovered against a married woman in an action brought

(*x*) 3 Sm. & Giff. 403.

er on any contract, the plaintiff must prove that the oman had separate property at the time the contract was n the present case no damages were recovered, or sought vered, against this defendant, and execution for the costs rdered to pay is limited by the judgment appealed from, the form approved of in *Scott* v. *Morley* (*y*), to the roperty "of the said defendant Mary Penglase not subject triction against anticipation, unless by reason of sec. 22 *rried Women's Property Act* 1890 the property shall be execution notwithstanding such restriction." The Act imit, it extends, the liability of a married woman to be undoubtedly a married woman could have been sued for ement of a trust before the Act was passed. The obliga- of this judgment follows necessarily upon the indisputable the Court to make the declaratory part of it, and neither e judgment is open to objection under the Act or the upon the Act. The appeal will be dismissed with costs e defendant Mary Penglase, execution for such costs ited, as in the judgment appealed from, to the separate the defendant, not subject to any restrictions against on, unless by reason of sec. 22 of the *Married Women's Act* 1890 the property shall be liable to execution notwith- uch restriction.

tor for plaintiff: *C. M. Watson.*
tor for defendant Mary Penglase: *Gill.*

A. J. A.

(*y*) 20 Q.B.D., at p. 132.

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Feb. 26.
March 9.

A'Beckett, J.

Synnot v. Synnot
20 V.L.R. 410.

HUMPHRIES *v.* HUMPHRIES.

Marriage and matrimonial—Marriage Act* 1890 (*No.* 1166), *s.* 74 (*a*)—*Dissolution of marriage—Desertion during three years and upwards—Separation deed—Improvident deed—Consent.

The parties were married in 1879, and about a year afterwards the wife withdrew from cohabitation against the husband's wish, under circumstances sufficient to constitute desertion. After such desertion had continued for about four weeks the petitioner executed a deed of separation prepared by a solicitor under the wife's instructions, which was left in her possession.

Held, that although the deed might have been improvidently executed by the husband, it intimated to the wife that he did not object to her thenceforth living apart, and as he had never recalled such consent, or told her he would not be bound by the deed, or requested her to return to him after its execution, it was effectual to terminate the desertion.

PETITION by husband against wife for dissolution of marriage on the ground that the respondent had without just cause or excuse wilfully deserted the petitioner, and without any such cause or excuse left him continuously so deserted during three years and upwards.

The suit was undefended.

Helm in support of the petition.

A'BECKETT, J. This is an undefended suit for dissolution of marriage by the husband, on the ground of the wife's desertion. The marriage was in January 1879. About a year after it the respondent withdrew from cohabitation against the husband's wish under circumstances sufficient to constitute desertion. After this desertion had continued about four weeks, the petitioner signed a deed under circumstances detailed as follows in his evidence:—

"Conant, a solicitor, called me into her house. Had no conception before that of any deed. Had given him no instructions. Saw Conant and her. He said he was instructed by her to draw a deed of separation, and would I sign it. At first I said I wouldn't. I said to wife: 'If it's your wish I'll do so.' I don't remember the purport or effect, except that I was not to interfere in her business or with her. It was read to me by Mr. Conant. It was already prepared. I had not a quarter of an hour's consideration. I was never asked to pay for it. I never saw a copy, or asked for one. She went away a few days after that. Never paid any money to her since. She never asked for money."

In his affidavit in support of the petition he refers to the deed as follows:—

"11. That the said respondent had a deed of separation drawn up by a solicitor, who induced me to sign the same. I have no copy of the deed, and so far as I can recollect it provided that the said respondent and myself should live separate and apart from each other, and that she should earn her own living and support her own children, and that I should earn mine and support my own children.

"12. That there was no monetary consideration whatever contained in the deed, and I have never paid her any money since, either directly or indirectly, for her maintenance and support."

The execution of this deed, which the petitioner very properly brought under the notice of the Court, creates a difficulty which the petitioner's counsel attempted to get over by suggesting that he should not be held bound by the deed; that it was obtained by surprise and did not indicate any deliberate consent to the wife living apart. He also referred to the case of *Moore* v. *Moore* (*a*), in which a deed of separation was held not to bar the wife's right to relief on the ground of her husband's desertion. The distinction between that case and the present is that, in *Moore* v. *Moore*, desertion for two years had given a right to relief on that ground before the deed was executed. In *Parkinson* v. *Parkinson* (*b*) a deed executed within two years was held to bar the wife's right to complain of desertion. The nearest case to the petitioner's is *Nott* v. *Nott* (*c*), but is distinguishable from it. The petitioner, by the deed executed in this case, which was left in the wife's possession, led his wife to suppose that he did not object to her thenceforth living apart. He never recalled the consent given by the deed, or told his wife that he would not be bound by it, or requested her to return to him after its execution. He may have executed it improvidently, but I hold it to have been effectual to terminate the desertion which had continued up to the date of its execution. I therefore dismiss the petition.

Solicitors for petitioner: *Fox & Overend* for *Motteram & Hyett*, Sandhurst.

A. J. A.

(*a*) 12 P.D. 193. (*b*) L.R. 2 P. & D. 25. (*c*) L.R. 1 P. & D. 251.

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Feb. 9, 11, 12.
March 15.

Holroyd, J.

CHAMBERLAIN *v.* THORNTON.

Statute of Frauds—Contract relating to land—Written instrument—Mutual mistake—Unilateral mistake—Rectification—Specific performance of rectified instrument.

In the absence of mutual mistake, the Court will not rectify or vary a written instrument on the ground that the plaintiff entered into it under a mistake, unless the error was induced by some statement or conduct of the defendant.

Semble, there is no general rule that, where there has been a unilateral mistake, a Court of Equity will not reform an instrument which the *Statute of Frauds* requires to be in writing, and then enforce specific performance of it, *e.g.*, where the plaintiff has been drawn into executing it by a mistake as to its contents, wilfully induced by the defendant, and has fully, or even in great part, performed what, owing to such mistake, he conceived to be the contract, the Court has reformed the instrument, and compelled the defendant to perform his part of it in the sense in which the plaintiff understood it.

ACTION to rectify a written agreement, and for specific performance of the agreement so rectified.

The plaintiffs, Robert Chamberlain and George Elliott, who were the owners of land, by a written contract dated 14th January 1890 agreed with the defendants Thomas, William, and John Thornton, who were railway contractors, trading as Thornton & Co., to allow the latter to remove any quantity of gravel from such land at the rate or price of 4*d.* per "square yard." The plaintiffs alleged, and the defendants denied, that this term was inserted by mistake—that, previous to the agreement, the parties had agreed that the defendants should pay that price per "cubic yard"; and the plaintiffs also alleged that when they heard the written agreement read out before they signed it, they thought that the term "square yard" meant a yard every way. The plaintiffs now sought to have the agreement rectified by inserting the word "cubic" for "square," and also sought an account of all the gravel taken from their land, and an order that the defendants should pay for such gravel at the rate of 4*d.* per cubic yard. The defendants counterclaimed to recover the difference between 300*l.*, which they had paid to the plaintiffs on account of the gravel, and 199*l.* 5*s.*, the value of the gravel taken by them, estimated at 4*d.* per square yard.

Madden and *Bryant* for the plaintiffs—After certain correspondence and negotiations to endeavour to arrive at a mutual

as to the rate per cubic yard to be paid by the defendants to be taken from the plaintiffs' land, an agreement was and a document was drawn up, by which the defendants ay 4*d.* per "square" yard. The plaintiffs at the time ent was signed thought that "square yard" meant a way, while "yard square" referred to superficial nt, and there is no doubt that when the parties signed nent they meant it to refer to cubic yards. That being mistake, the plaintiffs are entitled to have the written reformed.

and *Cussen* for the defendants—Before the document g the contract can be rectified, the Court must arrive at sion that the contract agreed to was different. The ifies the document, not the contract: *McKenzie* v.

YD, J. There is no doubt about that. When you rectifying the contract, you mean the piece of

case it is submitted that there was never any concluded except the paper itself. After the document was read ties signed, and *non constat* the defendants would have it had contained the words "cubic yard" instead of l. The utmost that has in any case been proved is that ffs misunderstood what the term "square yard" meant. not proved that the defendants made the same mistake, y led the plaintiff into error as to it, and, as the agree- een executed, it cannot be rescinded on the ground of nistake. One party is not answerable for the mistake er, unless he has induced it: *Smith* v. *Hughes* (*b*); *Donaldson* (*c*). Where the parties cannot be restored ginal position, no relief can be granted on the ground al mistake not induced by the other party: *The Atlas Publishing Co.* v. *Phillipson* (*d*). The parties were contracting to go on to land and remove part of It was therefore an agreement relating to land requiring

Eq., p. 375.
Q.B., p. 607.

(*c*) 6 V.L.R. (Eq.) 121.
(*d*) 16 V.L.R. 675.

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a writing to comply with the *Statute of Frauds*: *Lavery* v. *Purcell* (*e*); and in order to be available for the purpose of an action a complete writing within the Statute must have been in existence when the action was commenced: *Lucas* v. *Dixon* (*f*). In no case will the Court order the rectification of a contract which under the Statute requires to be in writing, and in the same action grant specific performance of the contract so rectified, except, perhaps, where the parol variation asked for has itself been partly performed: *Guest* v. *Watson* (*g*); *Story's Equity Jurisprudence*, § 161; *Olley* v. *Fisher* (*h*). Plaintiffs who ask a Court of Equity to grant relief of this kind must come to the Court promptly after discovering the mistake: *Harris* v. *Pepperell* (*i*). Here the plaintiffs knew of the error on 24th September 1890, and let the defendants go on taking the gravel for some months, and took no step to have the matter rectified till 4th July 1891.

Madden in reply—The evidence shows that the defendants knew that the plaintiffs were under a misapprehension when the agreement was signed, and said nothing about it. It also shows that they tacitly agreed to the terms of the contract before it was drawn up.

[HOLROYD, J. Suppose that the defendants knew that the plaintiffs were under a mistake, but signed the contract because it had the term "square yard" in it, and intending to pay the agreed price for the square yard, not for the cubic yard, though that might be a good defence to an action by the defendants for specific performance, is it a ground for rectifying the contract and granting specific performance of the rectified contract against them?]

In this case there was, in addition, the defendant's agreement previously made to pay by the cubic yard. All through the negotiations there was never any reference to any kind of yard except a cubic yard. In the cases cited *contra* it was sought to make an addition to the contract which had been verbally agreed to. In this case there is a complete written agreement within the Statute, but by mistake one of the terms is wrongly stated. I

(*e*) 39 Ch. D. 508.
(*f*) 22 Q.B.D. 357.
(*g*) 17 V.L.R. 497.
(*h*) 34 Ch. D. 367.
(*i*) L.R. 5 Eq. 1.

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ted that there was a part performance of the contract to the real agreement between the parties, for the s removed the gravel in trucks by the cubic yard.

OYD, J. Is it part performance by the plaintiffs that they e defendants to remove the gravel ?]

submitted that it is clearly so because, otherwise, the s would be mere trespassers. It was but natural that the should not bring the action the moment they discovered but should endeavour to ascertain whether the defendants o adhere to their position. As soon as the parties were rm's length the plaintiffs brought this action.

Cur. adv. vult.

March 15.

YD, J. The evidence in this case is full of contradictions, not trust entirely to the memory of any of the witnesses. e mixed different conversations together, and altered the vents. I believe however that when the plaintiff Elliott hat the words "square yards" should be inserted in the ontract, he supposed a square yard to signify, as he it, a yard every way, that is a cubic yard; and that, e document containing the contract was either signed n, it had been verbally agreed between him and the John Thornton that the defendants should pay for the en by them at 4*d.* per cubic yard, which agreement both tended should be reduced to writing. I do not believe Thornton was present when this document was being ut by Gott, Elliott's clerk, or when anything was said meaning of a square yard. Elliott does not pretend that Only Gott asserts it, and his memory was in my opinion e as that of any of the other witnesses, although he gave nce glibly enough. There are circumstances in John s subsequent conduct, and passages in the correspon- which to found a suspicion that John Thornton, when the document for his firm, really intended to bind his y by the cubic yard, and had not perceived the substitu- word "square" for "cubic." But suspicion, even strong is not enough. The proof of the mutual mistake should ing. John Thornton has sworn that before signing the

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document he observed that "square yards" had been inserted in it in lieu of cubic yards, and that he supposed the plaintiffs to have made the alteration because in their opinion the gravel would not average a yard in depth. I could not say with confidence that this statement was untrue. His own reason for accepting the alteration, that he thought he should get the best of the bargain, is highly probable. There is nothing to show that he knew, although he may have surmised, that Elliott had committed a blunder, and therefore have kept silence, resolving, if blunder there were, to take advantage of it. But he had done nothing to lead him into error. It was Elliott's own blunder. His distrust of John Thornton prompted him to reject the plain words which John Thornton had suggested. If Gott had any such conversations as he alleges with Robert Thornton about the measurement of the gravel, they are explainable by the fact that Robert left the arrangement of the whole business to his brother John, that he knew the terms which his brother had been offering, but had never been told what he had actually accepted.

If, as I have concluded, there was no mutual mistake, and the error of the plaintiff Elliott was not induced by any statement or conduct of the defendant John Thornton, it is clear that the written instrument cannot be rectified. Rectify is not exactly the right word to use. It would be more correct to say the written instrument cannot be varied by the Court. There is nothing by which to rectify it. In the action therefore the defendants must have judgment. It has not been necessary for me in this case to consider the argument which was pressed upon me, that where the mistake is only unilateral, a Court of Equity will never reform an instrument which the law requires to be in writing and then enforce specific performance of it. But I am not prepared to lay that down as a general rule. I think there have been cases in which, where a plaintiff has been drawn into executing an instrument by a mistake as to its contents wilfully induced by the defendant, and has fully or even in great part performed what owing to such mistake he conceived to be the contract, the Court has reformed the instrument and compelled the defendant to perform his part of it in the sense in which the plaintiff understood it, notwithstanding that the contract was one which required to be in writing.

fendants have put in a counterclaim for 100*l.* 15*s.*, the between 300*l.*, which they paid to the plaintiffs, and the e gravel taken out by them according to their estimate ntity at 4*d.* per square yard. They seek to recover this ney paid under a mistake of fact. But according to his nt John Thornton was not labouring under any mistake ent the plaintiffs the 300*l.* He then intended to continue plaintiffs' pit for some time longer; and it was for that d not because he thought he had already taken gravel of of 300*l.* at 4*d.* per square yard, that he deemed himself ding that sum. The plaintiffs were pressing for payment, d a rough estimate made of the quantity extracted, but did he pit then measured. The Court was not informed to estimate amounted, but we may fairly conclude, as it have been safe to pay 300*l.* upon it, that it was rather n over the mark. Subsequently John Thornton changed and suspended operations in the plaintiffs' pit. What he is that the over-payment was not due to any mistake of part, but to his not knowing his own mind, and I think rclaim must fail. I shall therefore direct judgment in to be entered for the defendants with costs, and on the im for the plaintiffs with costs.

ors for plaintiffs : *Gillott, Croker, Snowden & Co.*

ors for defendants : *Ford & Aspinwall.*

A. J. A.

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March 15.

WATSON *v.* RYAN.

Imprisonment for debt—Fraudulent Debtors Act 1890 (*No.* 1100), *s.* 22, *sub-sec.* (2)—*Neglect to pay—Means and ability—Order of commitment—Justices Act* 1890 (*No.* 1105), *s.* 147—*Amendment.*

An order of commitment under sec. 22, sub-sec. (2) of Act No. 1100, cannot be made upon the ground alone that the defendant has neglected to pay the debt; it must be founded upon the further grounds that he has had the means and ability to pay.

The Court will not exercise its power of amendment under sec. 147 of Act No. 1105, unless it be proved clearly to the satisfaction of the Court that sufficient grounds were proved before the Court below, on which that Court would have been justified in drawing up the order free from defect.

ORDER *nisi* to review.

The order complained of was an order of commitment made on the return of a fraud summons taken out by the complainant against the defendant. The order *nisi* to review was obtained on the ground that the order of commitment did not state that the defendant had neglected or refused to pay the amount in respect of which the said order of commitment was made. The order made by the justices was in the following form :—" Order for 30*l.* 7*s.*, costs 1*l.* 11*s.*, to be paid within fourteen days to the clerk of petty sessions, in default to be committed to gaol for one month, it having been proved that the defendants has had means to pay the same." The justices filed an affidavit on the return of the order to review, the effect of which is set out in the judgment.

Box to show cause—If the order be defective, it may be amended under sec. 147 of the *Justices Act* 1890. There certainly was sufficient evidence before the justices from which they could have drawn the conclusion that the defendant had had the means to pay this debt and had neglected to pay it.

Deakin to move the order absolute—The power of amendment is limited to cases where the court below had all the materials before it necessary for drawing up the proposed amended order. In this case there was nothing before the court of petty sessions to justify it in concluding that the defendant had done more than "neglected" to pay the debt; there was no evidence at all as to his means and ability to pay.

BOTHAM, C.J., delivered the judgment of the Court
THAM, C.J., WILLIAMS and HOOD, JJ.]. This order for
ent is defective in a material particular. It states:—

for 30*l.* 7*s.*, costs 1*l.* 11*s.*, to be paid within fourteen days to the clerk of
s, in default, to be committed to gaol for one month, it having been
the defendant has had means to pay the same."

is not sufficient. The offence with which the defendant
l is contained in sub-sec. (2) of sec. 22 of the *Imprison-
Fraudulent Debtors Act* 1890, which provides that no
o be made

it be proved to the satisfaction of the Court that the person making
yment of such civil debt, damages, instalment, or costs, either has or has
e date of the order the means to pay the sum in respect of which he has
, and has refused or neglected or refuses or neglects to pay the same."

efusal or neglect to pay is an essential part of the offence
y this sub-section, and the defect in the order is one
less it can be cured by amendment, is fatal. It has been
by Mr. Box that it may and ought to be amended by
the words that the defendant has had the ability to pay
nd has neglected to pay it. The power of amending is
ec. 147 of the *Justices Act* 1890, which provides that—

viction order or warrant shall be or be deemed to be void by reason of
r error in form or substance if upon the return of an order to review it
the satisfaction of the Full Court that sufficient grounds were in proof
ourt, justice, or clerk making such conviction or order or issuing such
have authorised the drawing up thereof, free from such defect; and in
e Full Court may upon such terms as to payment of costs as it thinks fit,
aid conviction order or warrant."

that the power here given to the Court to correct defects
r should not be exercised, unless it be proved clearly to the
n of the Court that sufficient grounds were proved before
below on which that court would have been justified in
up an order free from defect. Now, the evidence in this
ry obscure as to the means of the defendant to pay the
the explanation given by the chairman of the bench does
up the obscurity. He states:—

king cognisance of the fact of the issue and return of the warrant of
lla bona, and of the service of the certified copy of the minute of the
nt, which documents were before us, we found that the defendant
pay the amount of the said judgment debt."

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WATSON
v.
RYAN.
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That would certainly be a very insufficient ground on which the conclusion of the bench that the defendant had means to pay could be founded, and places a difficulty in the way of this Court to make the amendment applied for. The debtor's neglect to pay may have been caused by his not having the means of doing so. The application for amendment cannot be granted, and in the absence of amendment the objection is fatal.

Order absolute, with costs.

Solicitors for defendant: *Macoboy & Jones.*
Solicitor for complainant: *Watson.*

W. H. M.

F.C.
1892
March 17.

HARDIE *v.* SINGLETON.

The Medical Act 1890 (*No.* 1118), *s.* 11—*Medical or surgical name or title—Oculist.*

The term "oculist" may be a medical or surgical name or title within the meaning of sec. 11 of Act No. 1118.

ORDER *nisi* to review.

The defendant Singleton was prosecuted before justices for using the term "oculist," he not being a registered medical practitioner.

The evidence in support of the charge was given by Hardie, the informant, who stated that he went to the residence of Singleton, the defendant, and saw upon the door a brass plate bearing the inscription, "J. Singleton, oculist and aurist." Upon going into the house he asked the defendant whether he was "Dr. Singleton, oculist," to which the defendant replied, "Yes." The defendant then asked the informant what was the matter with him, and the informant replied, "My eyes are weak from reading." The defendant then placed him in the light, and told him to close his eyes; after which defendant made some mesmeric passes across his face. The defendant then placed his hands on informant's forehead, and asked him, "Did you not feel that shock?" to which the informant answered, "No." Defendant gave informant a bottle of medicine and some pills, for which the informant paid ten shillings. The

was corroborated by another witness. It was proved that ndant was not registered. The justices convicted the t. An order *nisi* to review was obtained upon the ground term "oculist" was not a medical or surgical name e meaning of sec. 11 of the *Medical Act* 1890.

e was no appearance to show cause.

to move the order absolute—The mere use of the term " is not an offence against sec. 11 of the *Medical Act* The fact that a person says that he is an "oculist" of itself lead the public to believe that he holds a diploma. may endeavour to cure people without being registered, annot sue for his fees, and he must not pretend to have a ion which he does not possess. An "oculist" means a ho professes to heal diseases of the eye, but it is not a erm within the meaning of the section.

BOTHAM, C.J., delivered the judgment of the Court OTHAM, C.J., WILLIAMS and HOOD, JJ.]. The ground ich this order has been obtained is this: "That the term is not a medical name or title within the meaning of f the *Medical Act* 1890." Now, it lies upon the defendant se to establish that the conviction is wrong. We do not r intend to decide, that the term "oculist" must be l name within the meaning of sec. 11. It is a term of neaning, and may be such a term or name within the of the section, and may not be. It appears in this there was evidence upon which the justices could find defendant intended to use the term "oculist" on this as being a medical or surgical name within the meaning ction. When the defendant was asked by the informant he was "Dr. Singleton, oculist," he answered, "Yes."

c. 11. It shall not be lawful rson, unless registered under of this Part of this Act, to be or to take or use the name physician, doctor of medicine, n medicine and surgery, master in surgery, bachelor of medicine, doctor, surgeon, medical or general practitioner, or apothecary or surgeon apothecary, or accoucheur or licentiate or practitioner in midwifery, or any other medical or surgical name or title . . . . ."

F.C.
1892
HARDIE v. SINGLETON.
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Therefore, without deciding that this term "oculist" is and mus be in all cases a term or name within the meaning of the section we think that in this particular case there was evidence upon whic the justices were justified in finding that the defendant intended t use the term in that sense, and therefore the conviction was right.

Order discharged, without costs.

Solicitor for defendant: *F. J. S. Stephen.*

W. H. M.

F.C.
1892
March 18.

GRIGG *v.* BENNETT.

Imprisonment for debt—Fraudulent Debtors Act 1890 (*No.* 1100), *s.* 22—*Schedul IV., Form I.—Notice to appear.*

Form I. of Schedule IV. of the *Imprisonment of Fraudulent Debtors Act* 189 is defective in not setting out a day on which the debtor is to appear in answer to summons issued under the provisions of sec. 22 of the Act. Where the debtor doe not appear in answer to a summons in this form no order of commitment can be mad against him.

ORDER *nisi* to review.

On the 4th of June 1891 the plaintiff obtained an order from th justices at Drysdale, sitting as a court of petty sessions, against th defendant for the payment of the sum of 6*l.* 2*s.* 10*d.* The defendan did not pay the amount, and on the 20th of July he was served wit a debtor's summons in the form set out in Form I. of the Fourt Schedule of the *Imprisonment of Fraudulent Debtors Act* 189 (No. 1100). On the 23rd of July the summons was called on, bu the defendant did not appear, and an order of commitment wa made against him. The defendant then obtained an order *nisi* t review this decision on several grounds, the ground chiefly relied o being that the summons served on him did not state any day fo appearance in answer to it.

Power to show cause—The summons in this case followed th Form I. of Schedule IV. of the *Imprisonment of Fraudulen Debtors Act* 1890. By sec. 22 of that Act it is provided that th "person making default may be served with a summons in th

form in the Fourth Schedule." That form does not provide for any day on which the debtor is to appear.

Anderson to move the order absolute was not called on.

PER CURIAM [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. The objection is a fatal one. The form in the schedule is clearly defective. It is impossible for the debtor to appear personally when he is not informed when he is to appear. The order to review will be made absolute, with costs.

Solicitors for appellant: *Davies, Price & Wighton*, for *Higgins*.
Solicitor for respondent: *Fitzgerald*, for *Litchfield*.

A. F. M

NEILSON *v.* NEILSON.

1892
March 1, 21, 25.
Holroyd, J.

Husband and wife—Marriage Act **1890 (*No.* 1166), *s.* 74 (*a*)—*Dissolution of marriage—Desertion during three years and upwards—Cruelty of husband—Wife leaving home—Desertion of husband—Subsequent mutual agreement—Suspension of cohabitation—Acts of husband.***

Where a wife leaves a husband against his will, because of his cruelty, although his cruelty may have afforded her a good excuse for so doing,

Quære, whether it amounts to desertion on his part.

Where cohabitation ceased by desertion on the part of a husband, and shortly after the husband and wife agreed that they should temporarily live apart,

Held, that while such agreement lasted, the desertion could not be held to be continued; but

Semble, if during such temporary suspension of cohabitation the husband should be guilty of unequivocal acts, demonstrating that he had taken advantage of it to break off his connubial relations, and had in fact abandoned his wife, desertion should be held to be commenced from the time of the commission of those acts.

PETITION for dissolution of marriage.

This was a petition by wife against husband, on the ground that the respondent had without just cause or excuse wilfully deserted the petitioner, and without any such cause or excuse left her continuously so deserted during three years and upwards.

Lewis for the petitioner—The desertion had its inception in the wife's being forced to leave the husband because of his cruelty.

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The wife had ample cause for leaving, and where that is so it amounts, together with the subsequent continued separation, to desertion by the husband: 1 *Bishop on Divorce*, § 791; *Hodges* v. *Hodges* (*a*); *Ward* v. *Ward* (*b*); *Thompson* v. *Thompson* (*c*); *Cargill* v. *Cargill* (*d*); *Moncrieff* v. *Moncrieff* (*e*). Though a husband supports his wife, it amounts to desertion on his part if he do not also afford her his society and protection: *Nimmo* v. *Nimmo* (*f*); *O'Connor* v. *O'Connor* (*g*); *Wilkinson* v. *Wilkinson* (*h*); *Williams* v. *Williams* (*i*); *Yeatman* v. *Yeatman* (*k*); *Fitzgerald* v. *Fitzgerald* (*l*).

[HOLROYD, J. Assuming that the wife was driven from her home by such acts of her husband as would justify her in leaving him, and that subsequently a mutual agreement between them was entered into that the wife should continue to reside with her mother until she should have recovered from some disease from which she was suffering, such as was proved in this case, could there be said to be desertion while such an agreement lasted ?]

There is no evidence that either before or after she went to her mother's the respondent was willing to take her back and provide a home for her.

Cur. adv. vult.

March 25.

HOLROYD, J. A petition by a wife against her husband for dissolution of marriage on the ground that he had without just cause or excuse wilfully deserted her and without any such cause or excuse left her continuously so deserted during three years and upwards.

On the 27th of July 1888 the petitioner, then Alice Esta Matthew, was married to the respondent John Marius Neilson; and after the marriage the two lived together as man and wife up to the month of September 1888 at Ascot Vale, where the respondent carried on a grocer's business. The respondent began

(*a*) 1 Esp. 441.
(*b*) 1 Sw. & Tr. 185.
(*c*) *Ib.* 231.
(*d*) *Ib.* 235.
(*e*) 5 A.L.T. 193.
(*f*) 3 V.R. (I., E. & M.) 63.
(*g*) 12 V.L.R. 324.
(*h*) 13 V.L.R. 568.
(*i*) 3 Sw. & Tr. 547.
(*k*) L.R. 1 P. & D. 489.
(*l*) L.R. 1 P. & D. 694.

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his wife shortly after they were married. He used to sometimes with a stick and sometimes with his fists. y the 1st of September she accused him of suffering from He denied it; they quarrelled and he assaulted her. r across the face with a walking cane and on the ear with Then he hit her across the face with a deal board. Her severely bruised and bled. Afterwards he threw her on and kicked her. She was disfigured and much hurt. In nce of this assault she left his house and went to a r's. There she stayed two days, and then removed to the her sister, Mrs. Regan, at South Melbourne. She swears was afraid to return to her husband. For this assault the nt was brought before the court of petty sessions at on on the 11th of September, and bound over to keep the six months. The petitioner remained some weeks at her confined to her bed by this disease, and during that time and came once to see her, invited by her sister. She told she herself was suffering from the disease, and he replied could not believe it but would consult a doctor. Her roborates her as to the alleged illtreatment and as to the er suffering from some disease. The petitioner and her re the only two witnesses, and neither of them has charac- ne disease by name or description; and I have been left to t it was venereal. There is no evidence beyond the fact ife's having been afflicted with the disease that it was cated to her by her husband, but I believe it was not knowingly. The respondent's illtreatment of his htened her into quitting him for a time, but I should n the whole of the evidence that it was not actuated by gn of getting rid of her or compelling her to leave him. tioner, although at first afraid to return to the respondent, sed to be so. On the 17th of November 1888 she went her mother's, not being then completely recovered. Just oing she met her husband in the street. He asked, "Are ter?" She said, "No, I'm going to my mother's at nbool until I am able to come back to you." He said, ight you should go. I've been to the doctor's, and the old me that you were unfit to live with me for some time."

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Holroyd, J.

It would seem from this statement of the respondent, passed in silence by his wife, that both had consulted the same doctor, but i does not otherwise appear that either of them had consulted an doctor. The evidence is extremely meagre and vague, but I conclude that the separation between the husband and wife was a this time continued by mutual consent, with the intention that a soon as the petitioner was well enough cohabitation should b resumed. The petitioner did not recover from her illness for twelvemonth. About six months after she went to Warrnambool that is in May 1889, she received a letter from the respondent which she destroyed. In it he said he had sold his business and intende to travel with the money. In August 1889 he committed a assault on a woman, for which he was sentenced to three months imprisonment. His wife heard of his arrest on this charge. O the 23rd of January 1890 the respondent wrote to the petitioner addressing her as his dear wife, and describing himself as he heartbroken husband; informing her that he was out of gaol an was trying to get something to do, and begging for a loan of 10 to be raised on her jewellery. To that letter she sent no reply On the 13th of November of the same year she received anothe letter from him commencing "My dear wife, is there any hope o a reconciliation between us? I've tried to turn from you but cannot; my only hope of future prosperity depends on you;" an containing many professions, not easy to believe, of intense affec tion. In that letter the respondent begged the petitioner to retur to him, and offered to guarantee her from 2*l.* 10*s.* to 3*l.* a week a long as he lived. The petitioner did not reply to this letter. Sh assigns as her reason that before she had time to decide what repl she should make she saw in a newspaper that her husband ha been arrested on another charge of assaulting a girl. It appear that the respondent was tried upon a presentment for an assaul with intent to commit a rape, was found guilty of a commo assault, and sentenced to be imprisoned with hard labour for tw years. The offence was alleged to have been committed on th 17th of November. There is no evidence to show whether th respondent did or did not contribute anything to the support of hi wife from the time when she left him, nor whether he ever visite her after she went to her mother's house in November 1888.

Upon the foregoing facts I think that the desertion alleged has not been proved. The time when the respondent sold his business has not been fixed, but it must have been either in or shortly before the month of May 1889. From November 1888 until that time I can find no indication of an intention on his part to desert his wife; and even the sale of his business and his resolution to travel are not inconsistent with willingness to receive his wife and to work for her support as soon as she should be in a fit state to resume cohabitation with him. The wife in the first instance quitted her husband against his will, and though his cruelty afforded her a good excuse for so doing, I entertain grave doubt whether this constituted an act of desertion on his part. Afterwards, when her fear had abated, she resolved to remain apart from him until she was cured of the disease with which she was affected. If he had communicated to her a venereal disease, although unwittingly, I think that in this resolution also she was fully justified. But at this time she intended to return to him, and he was desirous that she should, and was willing to receive her. Cohabitation was temporarily suspended by mutual agreement between the parties. If the respondent had at the first deserted his wife, but repenting had returned to her and honestly entered into such an agreement, I do not think that while it lasted his desertion could be held to have continued. If during this temporary suspension of cohabitation mutually agreed upon the respondent had been guilty of unequivocal acts, demonstrating that he had taken advantage of it to break off his connubial relations and had in fact abandoned his wife, desertion should in my opinion be deemed to have commenced from the time of the commission of those acts. But no such acts have been brought to light here; and moreover a desertion commenced in May 1889, even if conclusively proved, would have been too late to warrant the petitioner's prayer. See *Fitzgerald* v. *Fitzgerald* (*m*); *Mackenzie* v. *Mackenzie* (*n*); *Trengrove* v. *Trengrove* (*o*). This petition will be dismissed.

Solicitor for petitioner: *Sandilands*.

A. J. A.

(*m*) L.R. 1 P. & D. 694. (*n*) 3 V.R. (L.) 248. (*o* 5 V.L.R. (L.) 27.

1892
March 9, 30.

Holroyd, J.

[IN CHAMBERS.]

BEESTON v. DONALDSON; RIGGALL, CLAIMANT.

Interpleader—Assignment for benefit of creditors—Bill of sale—Instrument Act 1890 *(No.* 1103*), s.* 132*—Non-execution of deed of assignment by creditors—Employment of debtor to realise estate—Debtor allowed to remain in possession of property.*

By a deed of assignment, executed by a debtor in insolvent circumstances, the trustee was empowered to make payments out of the estate to all the creditors who should execute the deed. All the creditors who chose to sign were enabled to take advantage of the deed.

Held, that this was an assignment for the benefit of creditors within the meaning of sec. 132 of Act No. 1103.

Under a deed of assignment for the benefit of creditors the trustees may be empowered to employ the debtor at a salary or fair remuneration for supervising the carrying out the trusts of the deed.

Under a deed of assignment the debtor may be allowed to retain possession of part of his property, and it is not necessary that all the debtor's property should be assigned to avoid the necessity of registering the deed as a bill of sale.

A trust to pay scheduled creditors and all others who should by reasonable evidence satisfy the trustee that they were at the date of the deed entitled to have been included as creditors, with power for the trustee to inquire into and insist upon such proof as he might deem reasonable in support of any debt alleged in the schedule to be due, is not a trust for the benefit of all the creditors.

In re Wiedeman (5 V.L.R. (I.) 32) followed.

A deed of assignment containing a release of debts on the part of the creditors who were expected to sign such deed has no effect until and unless it has been executed by one, at least, or more of the creditors.

INTERPLEADER.

This was a sheriff's interpleader summons. The claim made by the trustee of the estate of Joseph Donaldson, the judgment debtor, was based upon a deed of assignment for the benefit of creditors, which had been executed by Donaldson. The deed was dated the 15th February 1892. The goods were seized by the sheriff on the 14th March 1892.

The deed of assignment recited that it was made between "Joseph Donaldson of the first part, Wm. Riggall (the trustee) of the second part, and the several persons, firms, and corporations whose names appear in the first column of the schedule hereunder written, and all others (if any) the creditors of the said party hereto of the first part." There was a provision in

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d empowering the trustee to pay "a fair and reasonable sion or remuneration to the said Joseph Donaldson for ing the realisation of the property of the said Joseph on if he is appointed supervisor for that purpose," and commission to the said trustee of five pounds per centum gross amount to be received by him under or by virtue presents . . . . for his time and trouble in and he carrying out of the trusts of these presents, and in the ce to apply the same moneys in or towards payment of all s and sums of money owing by the said Joseph Donaldson ersons and parties who shall sign and execute these presents, se names appear as creditors in the said schedule hereunder and to all other (if any) of the creditors of the said Donaldson and of each of them who shall sign and execute esents." There was also power given to the trustee, "if he ink proper so to do, to allow the said Joseph Donaldson to e possession and use of his household furniture and effects, art or parts thereof, for any time or period, or to sell and the same to the said Joseph Donaldson . . . . for al or such other consideration as the trustee . . . . ink proper." There was also power given to employ on to assist in selling the property, and to allow him such compensation as the trustee might think reasonable. The had power "to admit any debt or claim upon or against the te for such sum and upon such evidence" as he shall think and reasonable, although the name of the creditor or may not appear in the said schedule, and to require any before receiving any dividend to deliver to him full par- of his debt in writing, and also a statutory declaration of The deed contained a release of debts on the part of the who were expected to execute it, and the concluding clause eed was in the following words:—"Provided always, and it agreed and declared, that the aforesaid release shall operate f full force and effect as against all the said parties hereto of l part who shall affix their hands and seals to these presents, standing that any other of the creditors of the said Joseph on shall not execute the same." The schedule contained es of sixteen creditors, with the amount of the debt owing

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to each creditor, but no creditor had signed the deed, which was executed by the judgment debtor only, and had never been registered.

Mitchell for the claimant—This deed need not be registered as a bill of sale, as it is an assignment for the benefit of all the creditors, and therefore comes within the exception of sec. 132 of the *Instruments Act* 1890. Any creditor under this deed may come in and take advantage of it by executing the same, and it is therefore for the benefit of all the creditors: *General Furnishing and Upholstering Co.* v. *Venn* (*a*); *Boldero* v. *The London and Westminster Discount Co.* (*b*). The recital of the deed expressly declares that it is for the benefit of all the creditors.

The solicitor for the execution creditor—This deed is void under 13 Eliz., c. 5, as there is no consideration for it, and may delay and defraud creditors. The deed has no force until one creditor at least has signed. It may be that no creditor may ever sign it, and it contains provisions which probably would prevent reasonable persons from signing, and therefore it cannot be said to be for the benefit of *all* the creditors. If it is not for the benefit of all creditors, it must be registered as a bill of sale: *Port* v. *London Chartered Bank* (*c*).

[HOLROYD, J. In that case there was a provision that the deed had to be signed within a certain time.]

The principles enunciated in that case are contrary to the principles approved of in the English cases cited by Mr. Mitchell, but they have been always followed in our Court: *In re Wiedeman* (*d*): *In re Derham* (*e*). There are also objections to this deed, inasmuch as it allows the debtor to retain possession of his household furniture and effects, and empowers the trustee to employ the debtor at a salary, and to pay himself a commission.

Mitchell in reply cited *In re Vagg* (*f*); *In re Thomas and Cowie* (*g*); *Reg.* v. *Crease* (*h*).

Cur. adv. vult.

(*a*) 2 H. & C. 153.
(*b*) 5 Ex. D. 47.
(*c*) 1 V.R. (L.) 162.
(*d*) 5 V.L.R. (I.) 32.
(*e*) 1 V.L.R. (I.) 2.
(*f*) 13 V.L.R. 172.
(*g*) 9 V.L.R. (I.) 2.
(*h*) L.R. 2 C.C. 105.

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Holroyd, J.

HOLROYD, J. A sheriff's interpleader summons. The only matter in contest between the execution creditor and the claimant was the efficacy of a deed of assignment for the benefit of creditors, under which Mr. Riggall claimed the goods of the debtor which had been seized. The deed bore date the 15th of February last, before judgment was signed in the action. It had been executed on that day by the debtor whose execution was admitted, but by no other creditor at any time, and it had not been registered. The goods were seized on the 14th of March, and written notice of the claim was served on the sheriff's officer on the following day. On behalf of the execution creditor it was objected that the deed was not for the benefit of all the creditors of the debtor, and ought therefore to have been registered as a "bill of sale" under sec. 133 of the *Instruments Act* 1890 to make it good against the execution creditor; that it was void under the 13th Eliz., c. 5, as intended to delay hinder or defraud creditors; and finally that having been executed by nobody but the debtor it never took effect.

By the 132nd section of the *Instruments Act* 1890 assignments for the benefit of the creditors of the person making or giving the same are expressly excluded from the term "bills of sale." It has however been held that the expression "for the benefit of the creditors," in a section of the English Act, 17 & 18 Vic., c. 36, corresponding with this one, means "for the benefit of all the creditors": *General Furnishing and Upholstering Co.* v. *Venn* (*i*); *Boldero* v. *The London and Westminster Discount Co.* (*k*). This deed was impugned as not being for the benefit of all the creditors upon various grounds: First, that the trust for the payment of debts out of the residue, after satisfying the costs charges and expenses thereby provided for, was for payment only to the creditors who should execute the deed; secondly, that amongst the charges and expenses so provided for were included a fair and reasonable commission or remuneration to the debtor for supervising the realisation of his property if he should be appointed supervisor for that purpose, and a commission of 5 per cent. to the trustee for his trouble on the gross amount to be received by him except on any moneys then in the Federal Bank to the credit of the debtor; thirdly, that the trustee was empowered, if he thought proper, to

(*i*) 2 H. & C. 161. (*k*) 5 Ex. D. 47.

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allow the debtor to retain the possession and use of his household furniture and effects or any part thereof for any time, or to se and re-assign the same to him or to any person on his behalf fo a nominal consideration or other consideration to be determined b the trustee; fourthly, that the trustee was authorised to emplo the debtor or any other person or persons in collecting the asse carrying out the trusts or winding up the estate, and to allow the such salary or compensation as he might think reasonable; fifthly that the trustee was empowered to admit any debt or claim upo the estate for such sum and upon such evidence as he should thin reasonable, although the name of the creditor or claimant migh not appear in the schedule of creditors or the sum appearing in th schedule as due to him might differ from the amount claimed, an to require any creditor before receiving any dividend to deliver t him full particulars of his debt in writing and also a statutor declaration of proof of his debt in like manner and form and to th like effect as nearly as might be as he would be required to do the estate were insolvent.

As to the first of these grounds I have no doubt. Any credito may take advantage of the deed who chooses to sign it, and if th trusts were being administered in equity, the Court would comp him to execute before he could come in under it. On the fac of the deed, so far as concerns this matter, it appears that was intended for the benefit of all the creditors: *Genera Furnishing, etc., Co.* v. *Venn* (*l*); *Boldero* v. *The London, etc Discount Co.* (*m*).

The second and fourth grounds are of the same character. Th clauses to which exception has been taken only provide for a fa remuneration to the persons employed in realising and distributin the assets. It is not unreasonable that the trustee should receiv compensation as well as anyone else who lends his services for tha object, or that he should avail himself of the assistance of the debto who is best acquainted with his own business. The trustee's com mission is fixed, and some discretion must be conceded to him as t the salaries to be allowed to his employés. At the first blush hi own commission does not seem excessive, and there is no evidenc to show that it would be so.

(*l*) 2 H. & C. 161. (*m*) 5 Ex. D. 47.

spect to the other grounds, the third and fifth, I feel giving. It has not been unusual in deeds of this to permit the debtor to retain possession of his ither permanently or temporarily; but I have no idea hole estate of the debtor is worth, or what may be the is household furniture and effects, and I can therefore pinion whether it is fair to the creditors that such a uld be vested in the trustee. The exception really this, that as it was within the trustee's power to restore old furniture and effects to the debtor for a nominal assignment was not an assignment of all the debtor's But is it necessary that all the debtor's property should l in order to avoid the necessity of registering the deed sale? I think not. The Statute does not say so, but eeds of assignment for the benefit of creditors in general

ng now to the fifth ground, it was decided by Moles- that a trust to pay scheduled creditors and all others l by reasonable evidence satisfy the trustees that they e date of the deed entitled to have been included as with power for the trustees to inquire into and insist proof as they might deem reasonable in support of any ed in the schedule to be due, was not a trust for the all the creditors: *Re Wiedeman* (*n*). The discretionary committed to the trustees of this deed, of admitting or such sum and upon such evidence as they may think easonable, is substantially the same as that in *Wiedeman's* h has not been overruled: See *Re Thomas & Cowie* (*o*); *Danby* (*p*). There sub-sec. 1 of sec. 37 of "*The Insol-tute* 1871" was under consideration, but the point l was the same. "For the benefit of the creditors means "for the benefit of all the creditors," although also "for their equal benefit": *Re Wood* (*q*). If this rect, this deed can be of no avail as against the execution See *Re Vagg* (*r*).

R. (I.) 32.
R. (I.) 2.
L.R. 957.

(*q*) L.R. 7 Ch. 307.
(*r*) 13 V.L.R. 172.

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Holroyd, J.

I do not acquiesce in the objection that this deed is void by virtue of the Statute 13 Eliz. c. 5. To avoid a deed under that Statute the intention to delay hinder or defraud creditors must have been an actual as distinguished from a constructive intent, just as under sub-sec. 2 of sec. 37 of "*The Insolvency Statute* 1871," the intention must exist in fact and cannot be presumed: *Michael* v. *Oldfield* (*s*); *Davey* v. *Danby*; *Boldero* v. *The London, etc., Discount Co.*; *Alton* v. *Harrison* (*t*). The reason why no creditor executed the deed between the 15th of February and the 14th of March has not indeed been explained; but I cannot assume that the delay would not admit of explanation or was a sign of dishonesty in the debtor. Neither the execution creditor nor the claimant proffered any evidence beyond the claimant's affidavit. The deed itself indicates no design of impeding or defrauding creditors. The last objection, which was the least pressed, seems to me the most formidable. The deed contains a release of debts on the part of the creditors who were expected to execute it, which would have been a valuable consideration. It was not intended to be voluntary, and in my opinion could not operate at all unless and until it was executed by one at least or more of the creditors: See *Davy* v. *Schurmann* (*v*). Up to that time I apprehend it was merely an escrow.

I must order that the claim of the claimant be barred, and that he do pay to the sheriff and execution creditor respectively their costs of the summons, which I fix at 2*l.* 2*s.* and 1*l.* 1*s.* respectively. I understood Mr. Johnson to say that the sheriff's fees and charges had not been increased by the claim, and would not be increased by my inability to deliver judgment immediately, as under the *fi. fa.* he had been and would continue in possession of other goods not included in the claim.

Solicitors for claimant: *Blake & Riggall.*

Solicitors for judgment creditor: *J. M. Smith, Emmerton & Johnson.*

W. H. M.

(*s*) 13 V.LR. 793. (*t*) L.R. 4 Ch. 622. (*v*) 7 V.L.R. (L.) 188.

IN RE KERIN; IN RE LYNCH.

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March 9, 30.

ion Practice Act 1891" (*No.* 1216), *ss.* 10, 11—*Admission of solici-ified elsewhere than in Victoria—Qualifications for admission to s barristers and solicitors.*

who have been admitted to practise in any part of Her Majesty's ner than Victoria are not entitled to admission as barristers and Victoria, under sec. 11 of Act No. 1216, unless they prove to the the Court that they have obtained a qualification equal to the cribed by sec. 11, and also that all the qualifications (where there one) governing the admission of solicitors in that part of Her inions where they have been admitted are equal to the standard sec. 11.

were applications on behalf of Frederick George Kerin Lynch, for admission to practise as barristers and f the Supreme Court of the Colony of Victoria. The filed affidavits setting out that they had been admitted as solicitors of the Supreme Court of Judicature of The course of examination necessary for this qualifica-t out, also the subjects in which the applicants had o qualify themselves. The nature of these examinations sed in the judgment. It appeared that Mr. Kerin had "Finlater Scholarship," referred to in the judgment, ken part in examinations other than those which were o qualify him as a solicitor in Ireland.

moved the admission of Mr. Kerin.

oved the admission of Mr. Lynch.

Cur. adv. vult.

OTHAM, C.J., delivered the judgment of the Court IAM, C.J., HODGES and HOOD, JJ.]. Application was e Full Court on the 1st instant, on behalf of each of emen, that he should be admitted under the "*Legal Practice Act* 1891" to practise as a barrister and This Act came into operation on the 1st January 1892. 10th section it is enacted that no person shall be o practise as a barrister or a solicitor solely, but every

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person admitted by the Supreme Court shall be admitted both a barrister and solicitor.

By the 11th section it is enacted, subject to existing rights students-at-law, articled clerks, and judges' associates, that—

"No person not previously admitted as a barrister or solicitor in some par Her Majesty's dominions in which the qualification of barristers and solicitor in the opinion of the Supreme Court, of equal value to that required by section, shall be admitted as a barrister and solicitor unless he be a natural b or naturalised British subject, of the full age of twenty-one years, of good f and character, and unless—(1) He shall before being articled have passed matriculation or other examination required by the existing rules of the Supr Court to be passed by clerks before being articled; and (2) Shall also, ei before being articled, or after the expiration of such articles, pass the two an examinations, including the subject of jurisprudence required to be passed at University of Melbourne by a person who has obtained the degree of Bachelo Arts, as a condition to his obtaining the degree of Bachelor of Laws, or modification thereof as any rules of the Supreme Court may prescribe; (3) Shall also be articled to a barrister and solicitor for the term of three y and shall have served the whole of such time, either after passing or before pas the said two annual examinations; and (4) Shall also pass the final examina required by the existing rules of the Supreme Court to be passed by clerks be being admitted to practise as solicitors, or such modification thereof as any r of the Supreme Court may prescribe.

The Court is required by these provisions to consider, in case of an application for admission by a person who has derived qualification in some part of Her Majesty's dominions other than Victoria, whether the qualification, or all the qualifications, if th be more than one, of barristers and solicitors respectively in t part of Her Majesty's dominions, is in the opinion of the Court equal value, substantially, to the new qualification required from persons applying to be admitted in Victoria to practise as a barri and solicitor. Each of these applicants is a solicitor of the Supre Court of Judicature in Ireland, and each of them appears by affidavits filed to have been admitted after service under artic and after passing the preliminary examination and intermediate examinations and the final examination prescribed under authority of the Act 29 & 30 Vict., c. 24, entitled "An Act amend the laws for the regulation of the profession of attorn and solicitors in Ireland, and to assimilate them to those England." The standard of qualification thus prescribed generally speaking, of equal value, and probably in some respe of even higher value so far as they relate to the qualification

solicitor, than that of Victoria; but the subjects of
v, international law, constitutional law, and history and
nce, which are essential parts of the Victorian course, are
found in the compulsory Irish course, nor any other
hich would confer knowledge that would equally fit the
to practise both branches of the profession. It is stated
of these subjects are usually included in the examination
nlater" scholarship, but this examination is not part of the
on; it is an examination that is only open to a limited class
tes who have obtained first places and gold medals at the
ding examinations. This defect is, in our opinion, fatal,
mpossible for us to hold that this particular qualification
ys and solicitors in Ireland is of equal value to the joint
on for barristers and solicitors established in Victoria.

his is not the only difficulty that presents itself to
hese applications. Act 29 & 30 Vict., c. 84, provides
alifications for admission on terms of solicitors in Ireland.
ho have taken various degrees in Universities in the
ngdom (sec. 6), persons who have been called to the bar
(sec. 8), persons who have passed certain examinations
alty of law in the University of Dublin or in any of the
Colleges (sec. 9), and persons who have been *bonâ fide*
attorneys or solicitors for ten years (sec. 10) may be
and enrolled as attorneys and solicitors in Ireland on
rms. Each of these constitutes a distinct qualification,
ecessary that we should be satisfied that each of them is
alue to the Victorian qualification. It is not enough that
ant should prove that he has obtained a qualification of
ribed value; he must show that all the qualifications
n the part of Her Majesty's dominions from which he
equal to the Victorian standard, and no means are pro-
which we can form an opinion on that subject. We are
on the materials now brought before us by affidavit, to
pinion that the qualifications of attorneys and solicitors
are of equal value to that required in Victoria by sec. 11
egal Profession Practice Act 1891," and we are compelled
to refuse this application.

W. H. M.

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April 13, 22.

REGINA *v.* GREGG.

Criminal law—"The Crimes Act 1891" (*No.* 1231), *s.* 33, *sub-secs.* 1 *and* 2
Indecent assault upon a child—Testimony of child—Corroboration.

In a charge for indecent assault upon a child of tender years, where the unsw
evidence of the child has been admitted on the ground that she was possessed
sufficient intelligence to justify the reception of her evidence, and that she und
stood the duty of speaking the truth, it is necessary under sec. 33, sub-sec. 2,
Act No. 1231, that there should be other material evidence (besides the evide
of the child) implicating the accused.

Evidence given confirming the credibility of the child, and showing that
was telling what she believed to be the truth, but not implicating the accu
is insufficient.

SPECIAL CASE.

This was a special case stated by A'BECKETT, J. The followi
are the facts stated by the learned judge:—

The prisoner was charged with committing an indecent assa
on Jessie Swyere. She was a girl eight years of age. The priso
was undefended. The child was the first witness called. S
seemed intelligent, but on questioning her I did not think s
understood the nature of an oath. She had not been sworn in t
Court below, and I did not swear her, but took her evidence un
sec. 33 of Act No. 1231. She unhesitatingly identified the priso
and said that she had met him in the street when she was going
a message. He promised her a penny, and took her to an emp
house and into a bath room, the position of which she describ
There he exposed his person, took down her drawers, and commit
an indecent assault upon her. The mother, who was called, pro
the age of the child, and described the child's returning distress
from the message on which she had been sent. She said that t
child described the man who assaulted her as "a tall, dark m
with a black moustache and curls, dressed in dark clothes, wit
boxer hat, and that he had a mark across his nose like Charlie'
The witness stated that Charlie was a man who was an inmate
her house, and that he had a scar across the nose like a clear
marked scar which was on the prisoner's nose.

The child gave her mother the same account of the place wh
the assault had been committed, and of the assault as she gave
her evidence. A constable was called who had gone with the chi

d out the house and room, which were found as she had them. He drew her attention to several men supposed the description of the man who had assaulted her, and ase she said that the suspected person was not the other constable was called, who described his visit to er's house, and talking to him at his door in sight of the e prisoner went in, and the child then said that he was ho had assaulted her. The prisoner denied that he had he child, and called his wife and another witness to prove nt their evidence altogether failed to establish it.

ry convicted the prisoner, and I sentenced him to a twenty lashes, and two years' imprisonment.

ime after the verdict had been given, I had occasion to ore fully the provisions of sec. 33, and having regard to thereof, I doubted whether the conviction could be I therefore reserve the following question of law for eration and determination of the judges of the Supreme l have respited the sentence of flogging until after its ion :—

estion is—Can the conviction be sustained on the evidence ove set out?

n support of the conviction—The evidence of the child's to the mother immediately after the offence is sufficient ve evidence to satisfy sub-sec. 2 of sec. 33 of Act (*a*). The evidence of some independent witness is not If the surrounding facts corroborate the child's hat is all that the section requires.

l referred to *Reg.* v. *Paul* (*b*) ; *Reg.* v. *Bates* (*c*).

was no appearance on behalf of the prisoner.

urt intimated that judgment would be delivered in this the 22nd April, and that it would be advisable for the

33 (2). No person shall be onvicted of the offence unless admitted by virtue of this iven on behalf of the prose- rroborated by some other material evidence in support thereof implicating the accused."

(*b*) 25 Q.B.D. 202.

(*c*) 8 V.L.R. (L.) 319.

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Crown in the meantime to consider the facts of the case, so that the event of the conviction not being sustained some suggest might be offered by the Crown as to the course that should taken.

HIGINBOTHAM, C.J. This is a case in which the judge reser a question of law for the consideration of the Court. The priso was charged with committing an indecent assault on a girl ei years of age. The law in being at the time of the trial was law in force under Act No. 1231, sec. 33, which repealed the for provisions of the *Evidence Act* regulating the admission of evide of a child of tender years. The new law provides that if a chil tender years is tendered as a witness, and does not, in the opin of the Court or justices, understand the nature of an oath, evidence of such child may be received if, in the opinion of Court or justices, such child is possessed of sufficient intellige and sense of duty to know it is speaking the truth. The judge tried this case was of opinion that this child was of suffici intelligence to justify the reception of her evidence, and that did understand the duty of speaking the truth, and accordingly received her evidence.

It appeared that the child, immediately after the assault committed upon her, returned to her mother in a state of distr and told her mother that a man, whom she described as "a dark man, with a black moustache and curls, dressed in d clothes, with a boxer hat, who had a mark across his face Charlie," a man who at that time lived in their house, had assau her. She did not at that time identify her assailant as the subsequently charged. She afterwards was shown several men were suspected by the police as possible men who had commi the assault, and she denied that any of them had been her assail Subsequently she saw a man speaking to a policeman whom immediately identified as her assailant, and when her evidence received at the trial she identified the prisoner as being that and upon her evidence so given the jury convicted the prisoner.

The Act No. 1231 proceeds, after giving the test of admissib of the evidence of a child, to say that "no person shall be liabl be convicted of the offence unless the testimony admitted by vi

ction (33) and given on behalf of the prosecution be ed by some other material evidence in support thereof g the accused." It is suggested that upon this evidence o corroboration implicating the accused, and we are of at that objection is a good one, and must be sustained, his conviction cannot stand. There was evidence—in my orcible evidence—of corroboration, by other material of the child's testimony in the witness-box. That s contained in the statement made by the child to its d which agrees with and corroborates the statement made ld in the witness-box respecting the fact of the assault, where it was committed, the appearance of the place, and the appearance and the garb of the child's assailant. But did not at the time it spoke to the mother know the did not then, and it could not, identify the prisoner as assailant, and consequently that statement made to the s not evidence corroborative of the child's testimony in which implicated the accused. And, inasmuch as the n of the accused is made by the section an essential part ssary corroboration of a child's testimony in the box, I t the conviction of the prisoner is forbidden by this law, his conviction therefore cannot be sustained.

t that the Crown has not accepted and given the considera- we think was due to the suggestion of the Court to consider n application might not be made to the Court to grant a new he purpose of vindicating justice in this case. There have there are means, independent of the Statute, by which a nder years may be instructed in the nature of an oath, and ducated to give testimony which is admissible in law for se of vindicating the law in cases of this kind. In the f due consideration, which appears not to have been given, is prepared to take a course which it thinks proper, and a new trial, and it will be for the Crown to consider, now, ustice can be advanced by prosecuting again in this case.

re for myself to express a hope that the attention of the re will be directed to this case, and that consideration will by the Legislature to the subject of the law bearing upon his kind, which are of frequent occurrence. Crimes of

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this kind are atrocious in character and deadly in effect and pe
manence, and in the great majority of the cases of this kind t
law cannot be vindicated and the crimes, frequent as they ar
cannot be punished without the aid of the child's evidence.
would not be understood to suggest that the law which has heretofo
been in force should be revived. Under that law, contained in t
Evidence Act, sec. 50, the test was laid down of the admissibili
of the evidence of a child or infant under the age of seven yea
The provisions of that section only applied to cases of assault up
an infant under the age of seven years, and they provided that, up
caution administered by the Court to the infant, and upon its bei
proved to the satisfaction of the Court that such infant perfect
understood the value and the object of a declaration or affirmatio
and the purpose for which its testimony was required, the eviden
of the infant might be admitted. This section was limited
infants under the age of seven years, and in a very large number
cases the evidence was inadmissible through the inability of t
Court to satisfy itself that the child perfectly understood the natu
and object of the declaration or affirmation which the child w
required to make. The very terms "declaration" and "affirmation
are terms unfamiliar to a child of tender years, and it was only by
strain that the minds of judges could arrive at a condition of sati
faction that the child understood either the meaning of that whic
it was required to declare or affirm or even the very terms then
selves, and consequently in these cases it was impossible to get t
test and the evidence which had to be corroborated. The new A
furnishes a far more rational test of the admissibility of a child
evidence. It provides that the child shall be of sufficient intell
gence, and that it understands the duty of speaking the truth.
child of very tender years can easily be properly trained to supp
that test, and when that test is supplied, as it was in this case, t
evidence is admissible. Under the old law, no corroboration w
required when the evidence was admitted, but under the new la
corroboration is required. I am not to be understood to express a
opinion that corroboration may not be properly exacted in cases
this kind. Corroboration may be easily supplied in most cases b
our law, though not by the English law. Our law admits that
statement by a child to its mother, made after the commission

fence, is admissible, not as part of the *res gestæ*, but as onfirming and corroborating the testimony which the in the box; and in a very large number of cases I am of any kind of corroboratory evidence more satisfactory of a female child suffering under a shock of this kind, and by appearance, manner, words, and acts the distress caused ult. But under the present law such corroboration can only o as to implicate the accused person, if the child knows at f the assault the person who has assaulted her, or if some mony exists independent of that of the child by which the an be identified. I repeat that, considering the frequency imes and the extraordinary grave character of them, this of the existing law demands, in my opinion, the attentive ion of the Legislature, and I am supported in that view the most experienced and able English judges in the case . *Paul* (*d*). Referring to the terms of the English law in the English Statute, which is in the same language as e, Hawkins, J., expressed the same opinions which I now express, and which, according to the knowledge we all ppear to demand the attention of the Legislature, especi- count of the failure of justice in many cases arising from ty of the Court to give effect to the credible evidence of in consequence of this particular requirement of corrobo- dence implicating the accused. The conviction in this be quashed and a new trial ordered.

KETT, J. I concur in the judgment which has been and I desire to express my concurrence in the regret that expressed that this case has been so lightly considered by , that it came as a surprise to those representing the t the question would be considered as to the probability ld being so instructed that her evidence might be taken on hould, however, have said nothing in this case but for the n made as to the expediency of altering the law. Expres- wn opinion, I think that the Legislature have carefully and sidered the subject, and that the safeguard which is intro- the words under consideration in this case was a safeguard

(*d*) 25 Q.B.D. 202.

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which it would be dangerous to dispense with. The atrocity a frequency of these offences are recognised by every judge, but co sidering the nature of the testimony receivable, and the immatu mental capacity which the person giving such evidence may labo under, I am not prepared to say that an alteration of the law wou be advisable in this direction.

HOOD, J. I agree in thinking that the conviction in this ca cannot be sustained. There was evidence to support the girl story and to confirm her credibility and to show that she w telling what she believed to be the truth. But I think that t Legislature has in these cases required something more. The must be some other material evidence implicating the accuse that is, something proved altogether apart from the child's sto tending to establish the guilt of the prisoner. It seems to m that the intention was that no man should be convicted upon t unsworn testimony of a child of tender years unless other fac were established which would raise a suspicion of the accused guilt, even if the evidence of the girl had been absent. In t present case, beyond the statement of the child there was evidence implicating the prisoner. Nothing else was proved that itself would tend to fix the slightest suspicion upon him, and t whole of the evidence other than that of the girl would have appli to any man whatever that she had accused. Although I think th the conviction should be quashed, a new trial should be ordered, it is quite probable that by the time the case is again tried the chil who is eight years of age and intelligent, may have been instructe in the nature of an oath, so as to be sworn and give evidence in t ordinary way. I would add that, like my brother A'BECKETT, I d not concur with His Honor the Chief Justice in his view as to t necessity of legislative interference in these cases. It seems to m most important that the testimony of a child of tender years cases of this class should be supported by other evidence tending show that the accused is really guilty.

Conviction quashed and new trial ordered.

Solicitor for the Crown: *Guinness*, Crown solicitor.

W. H. M.

BOYES *v.* MOSS AND COMPANY. F.C.

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March 23, 24, 25.
April, 29.

hipping—Bill of lading—Discharge of goods into lighters—Right of or agent to make contract for consignee—Consignee—Abandonment, f on right to sue—Lighterman—Common carriers.

ıse in a bill of lading it was provided that "Consignees or their assigns dy to take delivery of goods as soon as the ship is ready to discharge them, ıe master or agent shall be at liberty to land and warehouse the goods, or em into a store ship or hulk, or into lighters, or on a wharf, as customary, ıant's risk and expense."

at under this clause the master or agent has implied authority to make, t of the consignee, a contract with lightermen for the carriage of the he ship's side to a safe and convenient place, and that the consignee as sed principal may, if he so elect, bring an action in his own name upon t.

oods have been abandoned to the underwriters, the insured may bring an own name for the benefit of the underwriters in respect of the goods.

exercising the public employment of a lighterman from the anchorage Bay to the wharf, for all who wish to employ him, is a common carrier.

L from County Court.

laintiff, who was the consignee of goods, brought an action e defendants, who were lightermen, "for the value of one rdware belonging to the plaintiff, and which was delivered ndants, to be safely carried by them from the "*Wilcannia*," ng in the port of Melbourne, in the lighter "*Restless*," to at Melbourne, but was not so carried." The defences the trial were—1. That the defendants were not common nd that they were sued as insurers, and not for negligence. was no privity of contract between the parties. 3. The n the goods remained in the captain of the ship. 4. The bandoned the goods to the insurers.

e bill of lading under which the goods were carried in the *nia*" it was provided that "Consignees or their assigns eady to take delivery of goods as soon as the ship is ready ge them, otherwise the master or agent shall be at liberty nd warehouse the goods, or discharge them into a store ulk, or into lighters, or on a wharf, as customary, at the 's risk and expense. The ship shall have a lien upon the all freight and charges for which the goods are liable e bill of lading." It was also provided by the bill of

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lading that the goods should be "delivered . . . . in the like good order and condition from the ship's deck at her anchorage to the plaintiff or his assigns."

It was admitted that the defendants had for many years prior to this action carried on the trade of lightermen in the port of Melbourne, carrying goods for freight under special terms from ships in the said port to wharves and other places within the same port, and *vice versâ*, on behalf of shipowners. It was also admitted that the cask, the subject matter of the action, was put on board the lighter to be carried for freight to the Australian wharf; that the lighter took fire while the cask was on board and was scuttled but afterwards raised, and that the cask was brought to the wharf in a damaged condition.

The plaintiff adduced evidence to show that he had known the defendants as lightermen for many years, and that they had often carried goods for him from ships to the wharf in their lighters, and that he always paid 5*s*. per ton for lighterage to them, and never made any bargain about the rates. In cross-examination the plaintiff admitted that he had abandoned the goods in question to the Southern Insurance Company, and that he was bringing this action on their behalf. The agents for the ship "*Wilcannia*" proved that it was their custom to bring goods from the ship to the wharf, but if the consignees gave notice that they wished to use their own lighters that was always allowed, but that as a rule they the agents for the ship, arranged for the lightering, and the consignees paid the lighterage to the lightermen. It was proved that the agents of the "*Wilcannia*" arranged for the defendants to do the lightering in this case. Evidence was also given to show that consignees always paid the lighterage, and that it was customary to ask the lightermen to do the work "at current rates." Evidence was adduced in cross-examination to the effect that the lighters do not travel from or to fixed points, and that a lighterman may refuse to do the business. The defendants called evidence to the following effect:—That they did not ply for hire from or to any fixed points; the rate of lighterage altogether depended on the class of goods offered, and according to the nature of the goods there was a differential rate; in each case a special arrangement was made; goods were often refused; the engagement in this case was

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h the agents of the "*Wilcannia*," and the goods were he order of the agents to be delivered on payment of ; the plaintiff was never known in this transaction. The idence material to this report is set out in the judgment urt.

udge of the County Court, after hearing the evidence, his decision, and upon a subsequent day delivered judg- favour of the plaintiff for the amount claimed. The s now appealed from that judgment.

en for the defendants appellant—The defendants were not arriers. A common carrier is a person trading between ini and open to engagement to any person who chooses to im at a certain rate or charge: *Nugent* v. *Smith* (*a*); *Farrant* (*b*). In the case of *Liver Alkali Co.* v. (*c*), Brett, J., says: "It is clear that a shipowner who rofesses to own sloops and to charter them to any one agree with him on terms of charter, is not a common ecause he does not undertake to carry goods for or to is sloop to the first comer." In this case the defendants ree to carry except upon special rates, and they carry to places in the port, and the rates differ according to the carriage. Counsel referred on this point to *Brind* v. The plaintiff has no right to sue. There is no privity ct between him and the defendants; the contract was the shipowners and the defendants, and the defendants carry these goods for the shipowners: *Goldsbrough* v. *h* (*e*); *Gwyatt* v. *Hayes* (*f*). Then as there has been an ent of the goods, the only persons who can sue are the The effect of a valid abandonment is to transfer the what remains of the thing insured, together with all the d liabilities arising out of its ownership, to the under- *Arnould on Marine Insurance* (6th ed.), pp. 973, 954, The authority cited by Mr. Arnould for this proposition *erigon*, c. XVII., s. 6, p. 130.

P.D. 423.
10 Ex. 358.
9 Ex. 338, p. 343.

(*d*) 2 Moo. & Rob. 80.
(*e*) 5 W.W. & A'B. (L.) 154.
(*f*) 2 A.J.R. 107.

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[*J. Dennistoun Wood*—The plaintiff admits that he is suing on behalf of the insurer.]

The insured, after abandonment, has no right to sue at all. I the whole interest is transferred together with all the rights, th only person who can sue is the transferree of such interest an rights. If the plaintiff succeeded in this action, there would b nothing to prevent the insurer from bringing another action for th same matter.

J. Dennistoun Wood for the plaintiff respondent—Th defendants are liable in this action whether they are called commo carriers or not. The plaintiff proved delivery of the goods int their charge, to be safely carried by them, and the goods wer admittedly lost, and it was for the defendants to prove that the los did not arise through their negligence. Where the contract is proved and there is a *primâ facie* breach of the contract, it is for the defen dants to give evidence of some kind to show that this apparent breac did not arise through their default. If the defendants are commo carriers, they must also prove that the loss occurred through the "ac of God," or some exception applicable to them. Even if the con tract was made by the plaintiff's agent with the defendants, there i nothing to prevent the principal from suing. The fact that th defendants did not know who was the principal cannot affect him The bill of lading gives authority to the shipowner to mak contracts for the consignee as to lighterage. It has been decide that a carrier's liability is not discharged by merely putting th goods on the wharf, if there is nobody there to take charg of them. He must take care of them in a reasonable way *Bourne* v. *Gatliffe* (*g*). Upon the construction of this clause i the bill of lading there is power given to the shipowner to dea with the goods in this way by putting them into a lighter, an when he has done that he has nothing more to do with the matter but it remains a question then between the lighterman and th consignee. The general principle is that the master of the shi has authority to deal with the cargo in a reasonable manner on behalf of the consignees: *Gaudet* v. *Brown* (*h*). The master o the ship makes the contract with the lighterman as the agent fo

(*g*) 11 Cl. & F. 45; 7 M. & G. 850. (*h*) L.R. 5 P.C. 134.

ee. Then, assuming that the defendants are bailees and
e except in case of default, still if the bailor shows that
bailment and the goods were not delivered to him in the
which they were bailed, a *primâ facie* case is established.
OTHAM, C.J. We are with you on that point.]
to the effect of abandonment. It is the usual practice
rer to bring an action in the name of the insured on
e insurer: *Peyton, Dowling & Co.* v. *Houlder* (*i*).
MS, J. The text books seem to lay down the principle
ct of abandonment is to divest the owner not only of
in the goods, but also of the right to bring an action.]
no authority for that proposition; it is founded merely
ns expressed by French jurists. The question here is
damages for breach of contract, and this right arose
donment.
referred to the cases of *Simpson* v. *Thomson* (*k*);
ainsbury (*l*); *Yates* v. *White* (*m*); *Lowndes on Marine*
pp. 224-5.

in reply—The cases cited as to the effect of abandon-
the right to bring this action in the name of the
n upon a different principle; they are cases of total
ere the property is not transferred, and the insured can
ee for the insurer. The expression of Lord Mansfield,
Sainsbury (*n*), is a careless expression, and though it
bandonment" it was not founded upon any authority,
a in *Yates* v. *White* (*m*) are based upon the expression
d Mansfield. The insurer has no interest in the subject
l in the case of abandonment. In *Simpson* v. *Thomson*
n before the Court was one of total loss and not of
t. There is no decision as to the precise point when
en an abandonment. There are cases where the insurer
n his own name: *Sharp* v. *Gladstone* (*o*); *Case* v.
p); *Phillips on Insurance* (4th ed.), Vol. II., p. 402,

R.
as. 279.
s' Rep. 61.
N.C., at p. 283.

(*n*) 3 Douglas' Rep. 61.
(*o*) 7 East. 24.
(*p*) 5 M. & S. 79.

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par. 1711; *Stewart* v. *Greenock Insurance Co.* (*q*); *Blaau* v. *Da Costa* (*r*); *Atlantic Insurance Co.* v. *Storrow* (*s*). As to other point, unless the Court decides that the defendants are comm carriers the plaintiff's case must fail, as he has proved no neglige In a count against a common carrier the defendant is liable ex for the "act of God," but in a count against a bailee where the g have been delivered in a damaged state the plaintiff is bound to p that the damage arose through the negligence of the defendant.

[WILLIAMS, J. I think that there is a marked distinc between not carrying the goods to their destination at all carrying them to their destination, but in a damaged state, and the latter case the plaintiff must prove that the goods were carried with reasonable care and consequent damage.]

Yes, and then the question comes back to this, were defendants common carriers? The shipowners acted in this on their own behalf and to protect themselves. The voyage did end at the anchorage. If the consignee does not come to delivery within a reasonable time, then the master has power u the bill of lading to put the goods into lighters and store them, this he does to protect himself and on his own behalf. The ma has no authority to make any contract for the consignee, merely on behalf of the shipowner, except in cases of extr danger, and for the benefit of the whole adventure: *Gaud Brown* (*t*).

J. Dennistoun Wood—There is no authority to be found w decides that upon abandonment the insured cannot sue in own n on behalf of the insurer; it is merely a question of adjustmen rights: *Miller* v. *Woodfall* (*v*); *Midland Insurance Co.* *Smith* (*w*); *Castellain* v. *Preston* (*x*); *Elbinger Actien-Gesellsc* v. *Claye* (*y*). In the notes to *Coggs* v. *Bernard* (*z*) lighters for public conveyance of goods come within the definition of "comm carriers." The owner of a general ship is *primâ facie* a comm

(*q*) 2 H.L.C. 159.
(*r*) 1 Eden 130.
(*s*) 5 Paige 285.
(*t*) L.R. 5 P.C. 134.
(*v*) 8 E. & B. 493.
(*w*) 6 Q.B.D. 565.
(*x*) 8 Q.B.D. 617; 11 Q.B.D. 390.
(*y*) L.R. 8 Q.B. 313.
(*z*) 1 Sm. L.C. (8th ed.), 199.

hire: *McLachlan* (2nd ed.), 365; *Abbott on Shipping* pp. 100, 277.

J. In the case of *Maving* v. *Todd* (*a*) it was decided finger carrying goods in his own lighter was a common l in *Ingate* v. *Christie* (*b*), Alderson, B., said: "If a s himself out to carry goods for everyone as a business carries from the wharves to the ships in harbour he is arrier."]

referred to the case of *Cammell* v. *Sewell* (*c*) as to the ndonment on the right to bring an action in the name

Cur. adv. vult.

OTHAM, C.J., delivered the judgment of the Court IAM, C.J., WILLIAMS and HOOD, JJ.]. Appeal from Court at Melbourne. The plaintiff claimed in this alue of a cask of hardware belonging to him, which was the defendant on or about the 7th November 1890 to rried by him from the "*Wilcannia*," a ship lying in the lbourne, in the lighter "*Restless*," to the wharf at but which was not so carried.

ndant rested his defence on the following three grounds: t there was no privity of contract between the plaintiff endant; second, that the plaintiff abandoned the goods ers; and third, that the defendant was not a common was sued as an insurer, and not for negligence. The uled these objections, and gave judgment for the amount l. 11*s*. 4*d*., with costs. The same questions that were by the learned judge in the Court below have been raised rmination upon this appeal. They are all questions of antile importance, and they have been fully and ably

has been contended for the defendant that there is no ntract between him and the plaintiff. The plaintiff was f the goods under a bill of lading, by which the goods

(*a*) 1 Stark. 72. (*b*) 3 Car. & K. 61.
(*c*) 3 H. & N. 617; 5 H. & N. 728.

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were "to be delivered (subject to the exceptions and conditi hereinafter mentioned) in the like good order and condition f the ship's deck, at her anchorage (where the ship's responsibi shall cease), at the aforesaid Port of Melbourne," to the orde the consignee. One of the conditions was as follows:—

"Consignees or their assigns must be ready to take delivery of goods as as the ship is ready to discharge them, otherwise the master or agent shall liberty to land and warehouse the goods, or discharge them into a store shi hulk, or into lighters or on a wharf as customary, at the merchant's risk expense."

The defendant was the representative of a firm of lighter who had been employed by the plaintiff for many years to c goods for him from ships in Hobson's Bay to the Australian wh in Melbourne. The defendant, with other lightermen, had b also employed for the same purpose by Messrs. Sanderson & agents for the steam ship "*Wilcannia*." The agents usu arrange with the lightermen for the lighterage of goods, and in present case, in accordance with the usual practice of agents advertisement appeared in the *Argus*, after the ship had b reported at the Customs House, announcing that "cargo will discharged into Moss's lighters, and conveyed to No. 8½ sh Australian wharf, at current rates." The practice was that lighterage should be paid by the consignee of the goods to lighterman, not to the shipping agent, who did not col lighterage. If consignees wished to take delivery themselve the ship's side they could do so; if they did not wish to do so ship's agent made an arrangement with the lighterman to lig the goods and hold them until the bills of lading were presen to him with the ship's agent's endorsement in proof that frei had been paid. In the present case the plaintiff presented the of lading to the defendant, and received two of the casks wh were not injured. He paid lighterage for those and got a rece and he refused to take delivery of the damaged cask, the subjec this action. For the defendant it was urged that upon this evide he had been employed as a lighterman by the ship, and not by plaintiff, the consignee, and that consequently the master or sh owner alone could sue for loss of or damage to goods after t were transhipped into a lighter. It was argued in support of

ne only object of the condition in the bill of lading was he shipowner to discharge the goods at the expense of of the goods, without loss to the shipowner of his lien and that it was unnecessary and improper to construe as giving power to the master or agent of the ship to contracts for lighterage as agent for and on behalf of the

unable to concur in this view. The master of a carrying wer, and also a duty in certain cases without any special n the bill of lading, to discharge goods at the ports of t the expense of the owner after the lapse of a reasonable n a reasonable manner, without losing his lien for freight ds. The law on this subject is clearly stated in the of the Privy Council in the case of *Cargo ex "Argos,"* *Brown* (*d*):—

cases have arisen in which the nature and scope of the duty of the nt of the merchant, have been examined and defined—amongst others, *nt* (*e*); *Notara* v. *Henderson* (*f*); *Australasian Navigation Company*

It results from them that not merely is a power given, but a duty is aster in many cases of accident and emergency to act for the safety of uch manner as may be best under the circumstances in which it may be hat, as a correlative right, he is entitled to charge its owner with the erly incurred in so doing. Most of the decisions have related to cases cident happened before the completion of the voyage; but their ak it ought not to be laid down that all obligation on the part of the for the merchant ceases after a reasonable time for the latter to take he cargo has expired. It is well established that, if the ship has waited ime to deliver goods from her side, the master may land and warehouse harge of the merchant; and it cannot be doubted that it would be his rather than to throw them overboard. In a case like the present, where uld neither be landed nor remain where they were, it seems to be a ension of the implied agency of the master to hold that, in the absence he had authority to carry or send them on to such other place as in his ndently exercised, appeared to be most convenient for their owner; and follow from established principles that the expenses properly incurred ed to him."

mmon law, then, the master has power to land goods, of owner has not taken delivery, without losing his lien for d to charge the owner with the expenses of landing, and probably carries with it an implied authority to enter

5 P.C., pp. 164-5.
re P.C. 419.
(*f*) L.R. 7 Q.B. 225.
(*g*) L.R. 4 P.C. 222.

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into contracts for this purpose on behalf and for the benefit of
owner. But the master's power at common law only arises aft
reasonable time—that is to say, a reasonable time under the circ
stances which exist at the time of unloading in each case: *Hic*
Rodocanachi (*h*)—has been allowed to the owner to take deli
himself at the ship's side. The uncertainty and delay arising f
this cause in the discharge of cargoes of general ships have le
the introduction into bills of lading of a clause like that contai
in this bill of lading. Clauses of this kind, as was observed
Lindley, L.J., in the case just cited, at page 632, are "obviou
inserted in the interest and for the benefit of the shipowner,
they give him an additional remedy for the recovery of what is
to him, and not a remedy in substitution for any which he wo
have apart from this clause." This clause is advantageous to
consignee of goods as well as to the shipowner, as it fixes a tim
which the consignee can take delivery for himself, if he thinks
to do so, and enables the master or the agent of the ship to act
him and for his benefit if he is not able or willing to act for hims
We are of opinion that an agreement of this kind between
master and the shipper of goods, the rights and liabilities of wh
are transferred to and vested in the consignee by Statute, inclu
an implied authority to the master or agent of the ship to m
as the agent of the consignee, a contract with lightermen
others for the carriage of goods from the ship's side to a safe
convenient place, and that the consignee, as the undisclo
principal of the master or agent of the ship, may, if he so el
bring an action in his own name upon such contract.
judgment appealed from was, therefore, right in holding that th
was privity between the plaintiff and the defendant created by
contract founded upon this clause in the bill of lading.

Apart from this, there was ample evidence that both parties rati
the contract made in this case by the agents of the ship—the de
dant by charging and taking payment for the lighterage of the ca
that were delivered, and the plaintiff by paying the lighterage
by bringing this action. The plaintiff abandoned the third cau
the underwriters, and brought the present action against
defendants for the underwriters, and at their request.

(*h*) 1891, 2 Q.B. 626.

contended for the defendant, secondly, that the action been brought in the name of the underwriters. It was not t the legal effect of abandonment by the insured is to sub- nderwriters into the rights and liabilities of the assured, in them the property in the thing insured from the time alty. But it has been shown that from the time of ield down to recent times the insurer on abandonment e name of the insured to bring an action to enforce his operty in the thing abandoned: *Mason* v. *Sansbury* (*i*); *hite* (*k*); *North of England Iron Steamship Association g* (*l*); *Sea Insurance Company* v. *Hadden* (*m*). The by abandonment has been treated as an equitable and although it may be that under the existing law an be brought by the insurer in his own name, it does not he may not also sue, in accordance with an established the name of the insured, and for his own benefit. on also fails.

it was contended that the defendant was not proved mon carrier, and that therefore he was not an insurer, proof was given that the injury to the cask was caused igence the plaintiff was not entitled to recover. The ether the defendant was, or was not, a common carrier tion of fact. The learned judge found that he was carrier, and there was evidence in our opinion to inding. It was held by Alderson, B., in *Ingate and Christie* (*n*) that "everybody who undertakes to carry who asks him is a common carrier. The criterion he carries for particular persons only, or whether or everyone. If a man holds himself out to do it for o asks him he is a common carrier, but if he does r everyone, but carries for you and me only, that is pecial contract." "We must treat it as firmly estab- ckburn, J., observed in *Liver Alkali Co.* v. *Johnson* (*o*), e absence of some contract express or implied intro- her exceptions" (*i.e.*, beyond acts of God and the

61.
N.C. 472.
.B. 244.

(*m*) 13 Q.B.D., at p. 712.
(*n*) 3 C. & K. 61.
(*o*) 9 Exch., at p. 340.

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enemies of the Queen), "those who exercise a public employm of carrying goods do incur this liability" (*i.e.*, the liability common carriers). It was held in this last-mentioned case that fact that the defendant did not ply between any fixed *termini* did relieve him from the liability of a common carrier. In the pre case evidence was offered by the defendant to show that his ligh did not always travel from or to fixed points, and that he sometir though not very often, refused engagements. But the judge not bound to accept this as against the proof that the defend ordinarily held himself out as exercising the public employmen a lighterman, and did the work of a lighterman from the ancho in Hobson's Bay to the Queen's wharf for all who wished to em him. The appeal has failed, in our opinion, upon all points, will be dismissed, with costs.

Solicitors for appellants: *Gillott, Croker & Snowden.*
Solicitors for respondent: *Malleson, England & Stewart.*

W. H. I

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April 13, 29.

HENDERSON *v.* HORNE.

Promissory note—Notice of dishonor—Instruments Act 1890 (*No.* 1103), *sub-secs.* 12, 13—*Banks and Currency Act* 1890 (*No.* 1164), *ss.* 17, 18— *holidays.*

The plaintiff was the holder of a promissory note due on Wednesday, December. The note was in the hands of a bank for collection. By sec. the *Banks and Currency Act* 1890, 25th December and 26th December are holidays. The bank sent notice of dishonour to the plaintiff, which reached on Monday, 29th December, and upon the same day the plaintiff posted a to the defendant, who resided in a different place to the plaintiff.

Held, that the notice of dishonour was sufficient.

APPEAL from judgment.

This was an appeal from a decision of Hodges, J., wherein plaintiff was non-suited at the trial of the action. The action brought by the holder of a promissory note against the defend who was the endorser. The defence set up was want of due n of dishonour. The facts are fully set out in the judgment.

Irvine for the appellant—The notice given was sufficient. By sec. 50, sub-sec. 12, of Act No. 1103, notice of dishonour is sufficient where the notice is sent off on the day after the dishonour of the bill when the parties reside in different places. By sub-sec. 18 of sec. 50 it is provided that "where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder." The bank was the agent for the plaintiff. The note being due on the 24th December, the notice should, ordinarily speaking, have been sent off on the following day to the plaintiff by his agent, but by sec. 17 of the *Banks and Currency Act* 1890 25th December and 26th December are bank holidays, and by that section the bank as agent had the following day, 27th December, within which to send notice to the plaintiff. December 28th was a Sunday, and the plaintiff therefore would be in time if he sent notice to the defendant on the 29th, by virtue of sub-sec. 18 of sec. 50 of the *Instruments Act* 1890 and sec. 18 of the *Banks and Currency Act* 1890. This notice was sent on the 29th December, and was therefore in time.

McHugh for the respondent—The provisions of sec. 17 of the *Banks and Currency Act* 1890 were not brought before the attention of the judge. There was no evidence of the residence of the defendant, and it does not appear that the parties resided in different places.

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. Appeal from judgment of nonsuit by Hodges, J. The action was brought by the plaintiff, the holder of a promissory note, against the defendant, an endorser, who pleaded that she had not due notice of dishonour. The note, which was payable at the Bank of Victoria, Harrow, was in the hands of the City of Melbourne Bank for collection. It was presented for payment and dishonoured on Wednesday, 24th December. Assuming, as it appears to have been assumed

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at the hearing, that the plaintiff and his agent, the City Melbourne Bank, resided in the same place, Melbourne, not of dishonour would be given within a reasonable time by t Bank if the Bank gave notice to the plaintiff or sent off notice time to reach the plaintiff on the day after the dishonour; and t plaintiff, upon the receipt of the notice, would have the same ti for giving notice to the defendant if he and the defendant resided the same place, or, in case they resided in different places, it wou be sufficient if the plaintiff sent off notice duly addressed and post to the defendant on the day after the plaintiff received the notic *Instruments Act* 1890, sec. 50, sub-secs. 12 and 13. Christmas D Thursday, 25th December, and the following day, Friday, 26th Dece ber, are appointed bank holidays by the *Banks and Currency Act* 189 sec. 17. Due notice as between agent and principal would be s by the Bank to the plaintiff, therefore, if the Bank sent off not in time to reach the plaintiff on Saturday, 27th December; and d notice as between the plaintiff and defendant would be given to t defendant if the plaintiff sent off notice to defendant, residing in different place, on the following Monday, 29th December. T plaintiff, in fact, received notice from the Bank through his solici on that day, Monday, and there was evidence that on the same d the plaintiff's solicitors sent off notice duly addressed and posted the defendant at Glenvale, Harrow, and consequently that t defendant had due notice of the dishonour of the promissory no The judge, therefore, was in error in nonsuiting the plaintiff. T appeal will be allowed, but without costs, as the judge's attenti was not called to the provisions of the *Banks and Curren Act* 1890. The case will be re-heard, and the costs of the fi hearing will abide the event of the re-hearing.

Solicitor for appellant: *Gardiner*.
Solicitor for respondent: *Macdermott*.

W. H. M.

THE QUEEN *v.* BUTLER.

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March 28.
April 29.

ation and Probate Act 1890 (*No.* 1060), *s.* 116—*Duty chargeable ty devised to widow—Exemption from duty—Victorian property—ssets.*

can be proved to the satisfaction of the Master-in-Equity that a is necessarily payable, wholly or in part, out of the proceeds of ictoria, the Master-in-Equity may allow a proportionate reduction in ble under the provisions of sec. 116 of Act No. 1060.

egacy is not specific, and there is property outside Victoria from acy might be paid, it lies upon the executor or person claiming the ler sec. 116 to prove that the whole or any part of the legacy must f the property of the testator in Victoria.

CASE.

ts stated were as follow:—William Martin made his ted 5th December, 1881. The said testator died on ne 1890, in Scotland, which country was his domicile of his death. In or about the month of June 1890, n of Robert Nicol as one of the executors of the which is equivalent to probate of the said will) was d in Scotland, and in or about the month of October rmation was also granted there to James Alexander other of the executors named in the will. In or month of July 1890 the confirmation granted to the t Nicol in Scotland was duly sealed in England, and s thereby duly granted in England to the said Robert n the 27th November 1890, probate of the said will granted in Victoria by this honorable Court to the one of the executors named in the will, leave being r the other executors except John Anderson, who duly probate thereof, to come in and prove. Probate of the with an exemplified copy of the will annexed, has also quently duly granted in New Zealand to one Percy Rolfe e attorney under power of the defendant duly appointed rpose. At the time of his death the testator had real al estate in Scotland of the value of about 12,715*l.* 10*s.*, al estate in England of the value of about 55,342*l.*, and tate in New Zealand of the value of about 3,574*l.*, and tate in Queensland of the value of about 775*l.*, and

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personal estate in Victoria of the value of about 39,095*l.* 18*s.* The debts of the testator at the time of his death amounted about 582*l.*, of which amount 100*l.*, according to the statement duty filed herein by the said defendant, were owing by the testa in Victoria, and the final balance appearing upon the said statem for duty filed by the defendant is 42,569*l.* 18*s.* 3*d.*, which amou however, included, as is now admitted, the sum of 3,574*l.*, be the amount of the testator's said property in New Zealand, which was included in error in his Victorian assets, and it has si been ascertained that 475*l.* of debts, instead of 100*l.*, were ow by the testator in Victoria. The testator left a widow surviv him (who is the wife referred to in the will), but no childr Questions have arisen with regard to the said statement for d (that is to say)—Whether for the purposes of assessing the d payable under the *Administration and Probate Act* 1890 bequest of 20,000*l.* given to the widow of the testator should distributed over the whole of the estate of the testator where situate, and only a proportionate part of the bequest charged w half duty under the 116th section of the Act, or whether the wh of the said bequest should be charged with half duty only?

The questions for the opinion of the Court are:—

(1) Whether in assessing duty under the said Act the amount of 20,000*l.* bequeathed to the widow should charged with only one-half of the percentage mentioned the Seventh Schedule, Part I., of the said Act;

and if not,

(2) In what manner ought the duty to be calculated as rega the said legacy.

If the first question be answered in the affirmative, then ju ment is to be entered for the defendant, with costs.

If the first question be answered in the negative, then judgm is to be entered for Her Majesty the Queen for such sum as Master-in-Equity shall determine, according to the principle calculation which the Court shall decide in relation to the sec question hereby submitted for its determination, with costs.

By the terms of the will, which was annexed to the special c the testator left to his wife a legacy of 20,000*l.*, in the follow terms:—"I bequeath the following pecuniary legacies, that is

say, to my wife a legacy of 20,000*l.*"; then followed other pecuniary legacies. He directed that all the legacies should be paid free and clear of any deduction for or in respect of probate legacy or other duty. He directed his executors to sell, call in, and convert into money such parts of his estate as did not consist of money, and with and out of the moneys to arise therefrom or thereby, and the ready money of which he died possessed in the first place, to pay his funeral and testamentary expenses and the duty payable in respect of his estate or property, the whole of which he directed to be paid and borne out of and by his estate, and also his debts and pecuniary legacies before mentioned; and he further directed that, after payment of the aforesaid expenses, duty, debts, and legacies, his trustees should stand possessed of the balance upon certain trusts.

Higgins (with him *Bryant*) for the plaintiff—The question for the consideration of the Court arises under the provisions of sec. 116 of the *Administration and Probate Act* 1890 (*a*). The testator has left his property in one lump sum, and out of that sum he has directed a legacy to be paid to his widow; that sum represents assets in various countries, including Victoria, and as there is nothing in the will directing that this legacy shall be paid out of the Victorian assets, and as it may well be that the legacy will not be paid out of the Victorian assets, the legacy cannot claim exemption of one-half of the percentage, as provided in sec. 116. It was decided in the case of *Blackwood* v. *The Queen* (*b*) that the only assets liable for duty under this Act are Victorian assets, and the

(*a*) "Sec. 116. When any person dies intestate, leaving a widow and children, or when any person dies intestate, leaving children, the only persons entitled in distribution to his estate, the duty shall be calculated at one-half only of the percentage mentioned in the Seventh Schedule; when any person dies intestate leaving a widow and no children, the duty shall be calculated so as to charge one-half only of the duty upon the distributive share of such widow. When the widow of a testator, or widow and children of a testator, or children of a testator, are the only persons entitled under his will, the duty shall be calculated at one-half only of the percentage mentioned in the Seventh Schedule; and when other persons are entitled under such will, the duty shall be calculated so as to charge only one-half of the percentage mentioned in the Seventh Schedule upon the property devised or bequeathed to the widow of a testator, or widow and children of a testator, or children of a testator."

(*b*) 8 App. Cas. 82.

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domicile of the testator has nothing to do with the question liability for Victorian duty. That principle was also adopted *Power* v. *The Queen* (*c*). The Act clearly refers to Victorian pr perty, and in sec. 116 the exemptions can only relate to exemptio in respect of Victorian property. The statement required to be fil under sec. 97, sub-secs. 1 and 2, refer also to Victorian propert It is for the widow to show that she is to be paid out of t Victorian assets. The will clearly directs that the legacy is to paid out of a gross sum which is to be collected together fro various countries. The local executor has merely to collect t assets from his own locality and assist in collecting the money in one gross sum, and out of that sum the executor of the testator domicile will have to pay the legacies. In sec. 116 the words us are "the property devised or bequeathed," while in sec. 103 t words are "devise, bequest, and legacy," from which it may gathered that sec. 116 refers to the devise of real estate. The lega in question is a general legacy. If the contention be not allow charging the whole of the Victorian assets with full duty, then t lower percentage chargeable should be calculated upon the propo tion which the Victorian assets bear to the total assets.

Counsel referred to the following cases: *Commissioner Stamps* v. *Hope* (*d*); *Reg.* v. *Smith* (*e*).

Madden (with him *Irvine*) for the defendant—A calculati could not possibly be made upon the basis of the proportion whi the Victorian assets bear to the total assets, inasmuch as there no power to compel the local executor to declare what the amou of the total assets may be. The final statement referred to sec. 97 is the statement of Victorian assets only. The object the Legislature in framing the provisions of sec. 116 was to prote the legacies to widows and children of the testator. The Legisl ture takes no account of the foreign assets and has provided scheme for ascertaining the amount of such assets; it demands final statement of Victorian assets, and upon that statement certain scale of charges is fixed subject to the exemptions, or rath the exceptions, mentioned in sec. 116. The cases cited by t

(*c*) 12 V.L.R. 50. (*d*) 1891 App. Cas. 476. (*e*) 9 V.L.R. (L.) 404.

plaintiff show clearly that the Act is meant to deal with Victorian assets, but when sec. 116 is looked at it clearly shows that the exemption therein made is with reference to a widow, wherever she may be domiciled. The will is to be regarded, and if a legacy is left to a widow, then that legacy is exempted from half the duty. The onus of proving that the legacy is not within the scope of sec. 116 is on the Crown. There is a duty cast upon the Master-in-Equity to calculate the duty, and he has to calculate the exemptions and give notice to the person of the amount of duty required to be paid. It would be impossible for the Master-in-Equity to strike any proportion between the Victorian assets and the foreign assets, as there is no provision in the Act which can possibly enable him to discover the amount of the foreign assets.

Counsel referred to the following cases: *Armytage* v. *Wilkinson* (*f*); *In re Wilsmore* (*g*); *In re Hamilton* (*h*); *Blackwood* v. *The Queen* (*i*).

Bryant in reply.

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS, and HOOD, JJ.]. The questions stated in this case arise upon the following words of sec. 116 of the *Administration and Probate Act* 1890:—"When other persons" (that is to say, besides the widow) "are entitled under such will, the duty shall be calculated so as to charge only one half of the percentage mentioned in the Seventh Schedule upon the property devised or bequeathed to the widow of a testator." It was contended for the defendant, one of the executors named in the will, to whom probate was granted in Victoria, that, as the testator at the time of his death had real and personal estate in the country of domicile, and in other countries as well as in Victoria, the bequest of 20,000*l.* to the widow should, in the absence of specific words confining her right to exemption or deduction to property in Victoria, be distributed over the whole of the estate of the testator wherever situated. We do not concur in this view. It was decided

(*f* 3 App. Cas. 355.
(*g*) 2 V.L.R. (I.) 30.
(*h*) 3 A.J.R. 95.
(*i*) 8 App. Cas. 82.

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in *Blackwood* v. *The Queen* (*k*), that the Victorian assets only of testator are liable to duty under the Act. The executor is n required and cannot be compelled to file a statement specifying t particulars of the personal and real estate of the testator in oth countries, and duty has to be paid on the value calculated upon t final balance of the real and personal estate in Victoria at the tir of the testator's death as determined by the master. When executor applies for probate in Victoria, the duty mentioned in t Seventh Schedule is *primâ facie* chargeable on the value so dete mined of the estate in Victoria. The words in sec. 116, "proper devised or bequeathed to the widow of a testator," clearly relate property in Victoria, and strictly construed they would justify reduction of the percentage only in cases where property in Victor was specifically devised or bequeathed to the widow. But where can be proved to the satisfaction of the master that a general lega was necessarily payable, wholly or in part, out of the proceeds property in Victoria, the master would be justified in allowing proportionate reduction. In the present case as the legacy is n specific, and as it appears that there is property outside Victor from which it might be paid, the burden of proof undoubtedly li on the executor claiming the reduction, and no proof has be afforded by the executor that the whole or any part of the lega must be paid out of the property of the testator in Victoria. O answer to the first question submitted for the opinion of the Cou is, "No." Our answer to the second question is, that the duty regards the legacy ought to be calculated on the higher scale.

Solicitor for plaintiff: *Guinness*, Crown Solicitor.
Solicitor for defendant: *Farmer & Roberts*.

W. H. M.

(*k*) L.R. 8 App. Cas. 82.

CAFFYN *v.* W. HOWARD SMITH & SONS LIMITED.

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March 29.
April 29.

Appeal from County Court—County Court Act 1890 (*No.* 1078), *ss.* 96, 133—*Appeal from order for new trial made by County Court judge.*

An appeal lies to the Supreme Court from orders of a County Court, interlocutory or final, and therefore an order of a County Court judge granting a new trial is the subject of appeal.

APPEAL from County Court.

The plaintiff sued the defendants for negligence, whereby the plaintiff whilst working on the defendants' ship, sustained personal injuries. The jury found a verdict in favour of the plaintiff, and assessed the damages at 468*l*. The defendants moved for a new trial, and the learned judge of the County Court set aside the verdict and made an order for a new trial on the ground that the evidence adduced showed that the plaintiff had been guilty of contributory negligence. Against this order for a new trial the plaintiff appealed.

Duffy for the plaintiff appellant, after reading the evidence, contended that there was ample evidence of negligence on the part of the defendants, and that the case was one proper to be left to the jury.

Madden (with him *Purves*, Q.C.) for the defendants respondents—There is an objection in the nature of a preliminary objection to the hearing of this appeal. This Court will not entertain an appeal from the order of a judge of a County Court ordering a new trial: *Cooper* v. *Higgins* (*a*); *Walker* v. *Graham* (*b*). Sec. 96 of the *County Court Act* 1890 gives the judge power to order a new trial.

[HOOD, J. In *Murtagh* v. *Barry* (*c*), it was decided that the power of the judge of the County Court to grant new trials under this section is not an absolute power to be arbitrarily exercised by the judge; he is in the same position as a judge of the Supreme Court: See *How* v. *London & N. W. Railway Co.* (*d*).]

(*a*) 6 V.L.R. (L.) 186.
(*b*) 3 A.L.T. 75.
(*c*) 24 Q.B.D. 632.
(*d*) 1891, 2 Q.B. 496.

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Duffy in reply—There is no authority for saying that ther to be no appeal from the order of a judge of the County C granting a new trial. The general rule is that, if the judg dissatisfied with the verdict of the jury he can order a new trial, that is the rule which has been acted on. *Cooper* v. *Hig* decided that a County Court judge ought to be in the same posi as a judge of the Supreme Court. *Sutton* v. *Henry* (*e*) is in favour. The old rule is now abrogated, even if the cases bear the contention of the other side.

[HOOD, J., referred to *Thomson* v. *Andrews* (*f*).]

Sec. 133 of the *County Court Act* 1890, in the last pro sets out the matters which are not to be subject to appeal, and order for a new trial is not included in them.

Cur. adv. vul

HIGINBOTHAM, C.J., delivered the judgment of the C [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. The plai recovered a verdict in the County Court at Melbourne for 468 an action against the defendants for negligence. The judge of County Court set aside the verdict, and ordered a new trial, on ground that all the evidence given at the trial showed that plaintiff was guilty of contributory negligence, and that there no evidence proper to be submitted to the jury on behalf of plaintiff on the question of contributory negligence.

A preliminary objection was taken to the hearing of the app viz., that the Court would not hear an appeal against an order judge of the County Court granting a new trial. *Sutton* v. *Henry* *Cooper* v. *Higgins* (*g*), and *Walker* v. *Graham* (*h*) were cited in port of this objection. The decision in those cases rested on ground that the judge having expressed himself dissatisfied the verdict, the Court would not interfere with his order. Altho there have been some decisions which favour the view that dissatisfaction of the judge who has heard the case is a suffic ground for granting a new trial, some of the older, and the w current of more recent decisions, are against the view, and it i longer open to doubt that a new trial will not be granted upon

(*e*) A.R., Dec. 19, 1878.
(*f*) 10 V.L.R. (Eq.), 48.
(*g*) 2 A.L.T. 8.
(*h*) 3 A.L.T. 75.

ne: See *Malpas* v. *Malpas and Others* (*i*), and the sion of the Full Court in *McMeckan* v. *Aitken*. as also placed upon the decision of Molesworth, J., in *v. Andrews* (*k*), who held that he had no jurisdiction to eal under sec. 120 of the "*County Court Statute* 1869" *County Court Act* 1890) from an order not being a final uit, as that section appeared to contemplate appeals only rders as, in one alternative at all events, finally disposed

The reason assigned for this view, namely, that the tains a prohibition against sending a case back to the urt, appears to be insufficient, for the prohibition nly applies to cases where the Court of Appeal directs be reheard. The terms of the section are quite large cover any order, whether interlocutory or final. The in the section clearly recognises the right of appeal rlocutory decisions, for it expressly excludes an appeal of one interlocutory decision only, namely, a decision any question as to the value of any real or personal the purpose of determining the question of the juris- ne Court. The framers of the rules, orders, and forms ng the practice and proceedings in County Courts, which me force and effect as if they had been enacted by the (sec. 148 of the *County Court Act* 1890), recognise m interlocutory orders: See Schedule of Forms, In *Thompson* v. *Rowe* (*l*) an appeal from an inter- der, dismissing a summons for an apportionment of heard without objection. We are of opinion that an lie to this Court from orders of a County Court, inter- well as final, in the sense which those terms must now bear, namely, that an order is final only where it is an application or other proceeding which must, whether ation or other proceeding fail or succeed, determine the l conversely that an order is interlocutory where it ffirmed that in either event the action will be deter- *Salaman* v. *Warner* (*m*). The preliminary objection, ils.

R. 700, 704.
. (Eq.) 28.

(*l*) 3 V.L.R. (L.) 55.
(*m*) 1891, 1 Q.B. 734.

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The order of the judge involved a decision upon a questio law, viz., that no evidence had been given at the trial except s as necessarily went to show that the plaintiff would not h suffered the injury caused by his fall but for his own negligent or default. Upon examination of the evidence we are clearl opinion that the learned judge was wrong in so deciding, and the case ought not to have been withdrawn from the jury on ground that contributory negligence was established against plaintiff. The question was one for the jury, and the verdic the jury ought not to have been disturbed. The appeal will allowed, with costs. The order for a new trial will be set aside, the application therefor will be dismissed, with costs. The ver found for the plaintiff below will be reinstated, with costs of act

Solicitor for appellant: *Fox.*
Solicitors for respondents: *Gillott, Croker & Snowden.*

A. F. M

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May 20.
Hodges, J.

[IN CHAMBERS.]

BONE *v.* BONE.

Husband and wife—Marriage Act 1890 (*No.* 1166), *s.* 111—*Application for pay of money into Court.*

In an application under sec. 111 of Acts No. 1166 for the payment of m into Court for the purpose of enabling the petitioner to have the merits of her investigated, it is necessary for the applicant to show that she has no suffi separate estate of her own, and further to prove circumstances from which the can gather what will be a sufficient sum to enable her to have the merits o case investigated.

THIS was an application under sec. 111 of Act No. 1166 behalf of the petitioner for an order that the respondent sh pay a sum of money into Court to enable her to have her investigated by her proctor. There was also an application alimony. The affidavit filed on behalf of the petitioner me stated that she had no separate estate. The respondent depo with reference to the application for alimony that the petitio was in receipt of 5*l.* per month from his mother. The respon was in receipt of an annuity of 7*l.* per month.

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n support—The receipt of the money from the respon-
ner is uncertain, and may be stopped at any moment.
payment of money into Court is always made when it
t the petitioner is possessed of no separate estate.

o oppose—No order for alimony *pendente lite* will be
the applicant is in receipt of an allowance equal or
al to the income received by the respondent. The
under sec. 111 of Act No. 1166 must be founded upon
ufficient to enable the Court to arrive at the conclusion
s any necessity for investigating the merits of the case.
ment should be made as to what the merits are, and
e Court must have some materials before it to enable it
will be a sufficient sum to order to be paid into Court.

, J. I shall not make any order for payment of
f the allowance be discontinued, then the petitioner may
e Court. I desire to say a few words as to the applica-
sec. 111. The practice seems to be unsettled, but the
of the section clearly require the Court to inquire into
ons. First, whether the petitioner has or has not
parate estate; and secondly, if she has not sufficient
tate, what would be a sufficient sum to enable her to
merits of her case investigated. The affidavits should
facts to enable the Court to arrive at this question.
ld be some materials before the Court showing what has
n done in the suit, and what in all probability will be
be done by the proctor for the proper investigation of
of the petitioner's case. Without some such affidavit it
le for the Court to fix any sum as being sufficient for the
quired. In this case I can see from the allegations in
n itself that some further slight investigation may be
I shall therefore order a small sum of money to be paid
for this purpose. I order the respondent to pay 3*l.* into
to pay the costs of the application, which I fix at 2*s.* 2*s.*

s for petitioner: *Gaunson & Wallace.*
s for respondent: *Moule & Seddon.*

W. H. M.

F.C.

1892
Feb. 25, 26.
June 2.

KING *v.* VICTORIAN RAILWAYS COMMISSIONERS.

Negligence—Contributory negligence—Passenger in railway carriage—Eviden

A passenger travelling by rail put his head out of the carriage window for reason not explained in evidence. An open door of a train passing in the opp direction struck him on the head and killed him. In an action brought by administrator of the deceased against the Railways Commissioners the jury f that the deceased did not act negligently in putting his head out of the window, that the door of the passing train was left open by the negligence of the defend servants, and a verdict was given for the plaintiff. Upon appeal, and a motion new trial.

Per HIGINBOTHAM, C.J. The act of the deceased in putting his head out of window of the carriage in which he was travelling was, though a voluntary act an unlawful one; and as he was wholly ignorant of the negligent act of the carr servants in leaving the door of the passing train open, was not such an act as w disentitle his representatives from maintaining an action for negligence against carrier.

Per HOLROYD, J. The carrier's contract to carry a passenger safely and secu is not conditional on the passenger's keeping the whole of his body within the of the carriage in which he is travelling.

Per WILLIAMS, J. If a passenger chooses to do an act outside the carr which may be dangerous, he does that act at his own risk, unless he has been ind or invited to do that act, or is excused from doing that act by reason of some inc ment, conduct, or default of the defendants.

Per HIGINBOTHAM, C.J., and HOLROYD, J. The fact of the door being ope the time and place of the accident was sufficient evidence of negligence on the pa the defendants to launch the plaintiff's case, and the case could not have been drawn from the jury.

APPEAL from judgment, and motion for new trial.

This was an appeal from the judgment of A'Beckett, J., an motion for a new trial in an action brought by the plaintiff, father and administrator of one Charles Franklin King, against Victorian Railways Commissioners for negligently causing death of the said Charles F. King while travelling on their railw The action was tried before A'Beckett, J., and a jury of six. defendants denied negligence, and alleged contributory neglige on the part of the deceased.

It appeared that on the night of 1st July 1890 the decea was travelling in a railway carriage from Melbourne to Essend After leaving North Melbourne the deceased put his head of the window of the carriage and was struck and killed by door of an open carriage of a train passing in the oppo

om Essendon to Melbourne. The distance between the
n which the trains were running was six feet; the
ween the edge of the open door of the one carriage and
the other was, according to the plaintiff's evidence,
r, according to the defendants' evidence, 11½ inches.
why the deceased put his head out of the window was
nd the extent to which he leaned out was not definitely

wing were the questions put to the jury by the learned
Was Charles Franklin King acting negligently in
head out of the carriage window in the way he did?
. (2) Was the door which struck him left open by
nce of the defendants' servant? Answer—Yes. The
00*l.* damages, and the judge directed judgment to be
he plaintiff for that amount.

ndants appealed from the judgment on the following
1) That the mere fact of the door of the passing train
was not evidence of negligence on the part of the
nd that no other negligence was given. (2) Assuming
rriage door was open through the negligence of the
the accident was brought about, not by reason of such
pen, but by reason of the voluntary act of the deceased
utting his head out of the window.

nds for the motion for new trial were:—(1) That as it
m the uncontradicted evidence at the hearing that the
s killed by a blow upon the head from an open door of a
he adjoining set of rails while his head and part of his
tended from, or was outside of, the carriage in which
was travelling as a passenger, the learned judge should
awn the case from the jury and directed judgment for
nts. (2) That the learned judge misdirected the jury
them that it was a question for them to decide whether
, in protruding a part of his body from the carriage,
with ordinary prudence or caution, or whether it was an
hould be considered as an act done at his own peril, a
t, an act involving in itself a risk which he might be
would run. That it was an act which was to be
s own circumstances. The learned judge should have

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directed the jury that the plaintiff was disentitled to rec
inasmuch as the evidence established that the conduct of
deceased in protruding his head and part of his body from
carriage in which he was travelling as a passenger was the p
mate and efficient cause of the death of the deceased. There
other grounds as to the reception of evidence, but they are
material to this report. The appeal and motion for a new
were heard together.

Bryant and *Hayes* for the appellants—The act of the dece
was a purely voluntary act, and not in any way induced by
negligence of the appellants. That fact distinguishes this
from the case of *Adams* v. *Lancashire and Yorkshire Rai
Co.* (*a*), and from the case of *Gee* v. *Metropolitan Railway Co*
The person whose misconduct occasions the risk is responsibl
the consequences of his own act: *Jones* v. *Boyce* (*c*). The con
to carry a passenger is one to carry him *inside* the carriage.
deceased had no right to put his head out of the window, or
did so he did it at his own risk. It has been decided in Am
that a passenger is disentitled to recover by reason of contribu
negligence for an injury received through sitting with his arm
of a window: *Todd* v. *Old Colony and Fall River Railway Co
Dun* v. *Seaboard Railway Co.* (*e*); *Pittsburg and Connell
Railway Co.* v. *McClurg* (*f*). There was no evidence to ju
the finding of the jury that the door was left open by the negli
of the appellants' servants; the plaintiff was bound to prove
fact, beyond that of the door being open, from which the
could reasonably infer that it was left open negligently: *Murr
Metropolitan District Railway Co.* (*g*); *Welfare* v. *Brig
Railway Co.* (*h*); *Daniel* v. *Metropolitan Railway Co.
Richards* v. *Great Eastern Railway Co.* (*k*).

Counsel also cited the following cases: *Wakelin* v. *Lo
and South-Western Railway Co.* (*l*); *Ennerson* v. *Coate*

(*a*) L.R. 4 C.P. 739.
(*b*) L.R. 8 Q.B. 161.
(*c*) 1 Stark. 493.
(*d*) 3 Allen 18; 7 Allen 207.
(*e*) 49 Am. Rep. 388.
(*f*) 56 Penn. 294.
(*g*) 27 L.T. (N.S.) 762.
(*h*) L.R. 4 Q.B. 693.
(*i*) L.R. 5 H.L. 45.
(*k*) 28 L.T. (N.S.) 711.
(*l*) 12 App. Cas. 41.
(*m*) 14 V.L.R. 155.

North-Eastern Railway Co. (*n*); *Lee* v. *Nixey and*

Iadden with him) for the respondent—The only autho- which the proposition is based that the contract is to senger *inside* the carriage are American authorities, and as such decisions are controlled by a widely different stem, they cannot be relied upon as establishing any f law which should govern the contract of carriage in tries. Where American cases are dependent upon the ns or characteristics of the country, they should not be ıthorities: *In re Missouri Steamship Co.* (*p*). The carriage is to carry a passenger allowing him a reason- f the carriage. The jury have found as a fact that there onable user. According to the decision in the case of *tropolitan Railway Co.* (*q*), a passenger is entitled "to e purpose of looking out of the window," and further entitled to assume that the door of the carriage is stened. He would be equally entitled to assume that the passing train were also properly fastened. It was the e appellants to see that the doors of the carriages were stened, and the fact that a door was open is sufficient *e* evidence of negligence: *Flannery* v. *Waterford and Railway Co.* (*r*). If the deceased was using ordinary velling the appellants are responsible: *Dudman* v. *North ailway Co.* (*s*).

t in reply.

Cur. adv. vult.

ourt differing in their opinions, the following judgments ered:—

BOTHAM, C.J. This action was brought by the plaintiff, and administrator of the estate of Charles Franklin King, for the benefit of himself, as the father, and of the mother of sed, against the Victorian Railways Commissioners, for

10 Q.B. 271.
T. 235.
h. D., p. 330.

(*q*) L.R. 8 Q.B. 165.
(*r*) Ir. Rep. 11 C.L., p. 36.
(*s*) 2 Times L.R. 365.

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negligent management of a train of the defendants' travelling Essendon to Melbourne, and for not securely locking and faste the doors of the first class carriages of that train, whereby deceased, who was then a passenger in a train of the defend from Melbourne to Essendon, was struck by the open door of of the carriages of the first-mentioned train, and killed. defendants denied the alleged negligence on their part, and all contributory negligence on the part of the deceased. The returned two special findings; first, that the deceased was acting negligently in putting his head out of the carriage wi in the way he did; and, second, that the door which struck deceased was left open by the negligence of the defendants' serv and they found a verdict for the plaintiff for 200*l.*, apportio one-half to the father and the other half to the mother o deceased. The judge ordered judgment to be entered in accord with the verdict. We have now to deal with an appeal by defendants from that judgment, and also with a motion by defendants for a new trial.

The deceased was a customs-house clerk to a firm Melbourne. He was often detained at business after hours. On the night in question, 1st July 1890, he was re ing from business to his father's house, at Essendon, by 11.20 p.m. train. After leaving the North Melbourne statio put his head out of the centre window of the carriage, describ a first class double bogie carriage, when he was struck and inst killed by the open door of a similar carriage of a train passi the opposite direction from Essendon to Melbourne. The dis between the edge of the open door of one of these carriages an surface of the closed door of the other carriage was 7½ i according to the plaintiff's evidence, or 11½ inches according t defendants' witnesses. There was a clear space of six feet bet the two sets of rails on which the two trains were running. reason which induced the deceased to put his head out o window is unknown, and can only be the subject of more or probable inference from the facts. The deceased had influen the previous April, and before and after that date he suffered dyspepsia and difficulty in retaining food on his stomach affection likely to be aggravated by influenza. A fellow passe

carriage observed that he looked weary and sat with his hand. This witness's memory varied as to the ich the deceased leaned out of the window. Another nger, who sat opposite to the deceased, stated that he of his body out as he could, and that he, the witness, e deceased might over-balance himself, caught at his ent him. It was suggested, on this evidence, that the s compelled to put his head out of the window to

t ground on which the defendants claim that the hould be reversed is that the mere fact of the Essendon carriage being open is no evidence of on the part of the defendants, and that no other negligence was given. I think that the fact that as open at the time and place of the accident was sufficient evidence to launch the plaintiff's case defendants, and that this question could not have rawn from the jury. Carriers of passengers for hire to see that everything under their own control is in mplete and proper order. This door was under the he defendants' servants, and it is not consistent with the are which the defendants were bound to take, or with and usual course of things in the management of trains, ors of carriages should be open while the train is in "There must be reasonable evidence of negligence," ice Earle observed in *Scott* v. *London Dock Co.* (*t*), the thing is shown to be under the management of the or his servants, and the accident is such as in the urse of things does not happen if those who have the t use proper care, it affords reasonable evidence, in the explanation by the defendants, that the accident arose of care."

contended for the defendants as a second ground of , assuming that the carriage door was open through the of the defendants, the accident was not due to that cause, voluntary act of the deceased himself in putting his head window, and that the judge upon this ground should

(*t*) 3 H. & C. 601.

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have directed the jury to find for the defendants. In suppor this view some American decisions were cited in which it was that wherever it was admitted or proved that the injury compla of was inflicted upon a passenger's arm, or any other part of body, protruded by the passenger's voluntary act beyond the li of the carriage, such protrusion constituted negligence *in se*, a would be the duty of the Court to declare the act negligence in No English authority was cited in support of this view. State it is, as a proposition of law, I must express my entire dissent it. Cases are easily conceivable in which a passenger woul compelled, by an imminent danger arising within the carriage i from some negligence on the part of the carrier, to put his out of the window to call for help, or in the attempt to escape. such a case the carrier, and not the passenger, would undoubt be liable for the consequences of the passenger's act. "I agree," said Montague Smith, J., in *Adams* v. *Lancashire Yorkshire Railway Co.* (*v.*), "that, if the negligence of a rai company puts a passenger in a situation of alternative dang that is to say, if he will be in danger by remaining still, an danger if he attempts to escape—then, if he attempts to esc any injury that he may sustain in so doing is a consequence o company's negligence." If in any conceivable case such an a the passenger would not be conclusive evidence of contribu negligence it cannot be true as a proposition of law that the constitutes negligence *in se*, and is an answer to the plain action.

It was further argued for the defendants that assuming act of the deceased not to be negligence *in se*, it was in this ca voluntary, and also an improper, act of the deceased not nec tated by any negligence or default of the defendants, and consequently the accident was not the result of the defend negligence, but of the negligence of the deceased. This argument was urged without effect in the case of *Gee* v. *M politan Railway Co.* (*w*). There a passenger on a Lo underground railway got up from his seat and put his hand bar which was placed across the window of the carriage, with intention of putting his head out sufficiently to see the ligh

(*v*) L.R. 4 C.P., at p. 742. (*w*) L.R. 8 Q.B. 161.

station. The pressure caused the door of the carriage to and the plaintiff fell out and was injured. The bar that it might be dangerous to put one's head out of the It was contended that the duty of the company was to ssenger safely so long as he sits quietly in the carriage, accident happened from any act of his inconsistent with ary behaviour of passengers, the passenger had only o thank, and the company were not liable. But it was he Exchequer Chamber, affirming the decision of the Bench, that there was evidence for the jury that the injury was the result of the defendants' negligence in not astening the door, and that the verdict for the plaintiff tand. Cockburn, J., distinguishing *Adams* v. *Lancashire shire Railway Co.* (*x*), said at page 165 :—

agree that the passenger must not do anything inconsistent with what rdinarily do on a journey. . . . Here, assuming that the company eir duty, the passenger did nothing more than that which came within his enjoyment while travelling, without committing any imprudence; hrough a beautiful country he certainly is at liberty to stand up and iew, not in a negligent, but in the ordinary manner of people travel- asure. Here the defendant was simply looking at the signal lights, as nothing in his conduct which can be imputed to him as negligence ce."

urn, J., in the same case observes at page 166 :—

e plaintiff conducting himself in such a way as amounted to a want care? As to that, I can only say it was a question for the jury, and ght in the verdict that they have found. Looking out of the window, a necessary act on the part of the passenger, was not an improper *dams* v. *Lancashire and Yorkshire Railway Co.* (*x*) the passenger ncurred a known and ascertained danger. That case is decided on a nciple, for here there was no known or ascertained danger. The his case is that the plaintiff, trusting that the company had done their up and looked out of the window, and, by reason of the door being fell out and was injured."

rgument for the defendants on the point now under ion attempts to apply the maxim *volenti non fit injuria* s of this case. In my opinion the maxim is inapplicable This maxim is not, as Bowen, L.J., observed in *Thomas rmaine* (*y*), "*scienti non fit injuria*," but "*volenti non fit* and it only applies to cases "where the danger is visible risk appreciated, and where the injured person, knowing

(*x*) L.R. 4 C.P. 739. (*y*) 18 Q.B.D. 685.

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and appreciating both the risk and danger, voluntarily encount them." But in the case now before us, as well as in the case *Gee* v. *Metropolitan Railway Co.* (*z*), there was no danger visib and the injured person did not and could not know or appreci either risk or danger as connected with his voluntary act. T maxim was held to apply to the facts in *Adams* v. *Lancashire* & *Yorkshire Railway Co.* (*a*), where the injured person undoubte knew that the carriage door was open, and it was ruled that must be taken to have voluntarily incurred the known and app ciated danger and risk of rising from his seat and attempting shut the door.

A different rule from that contained in this maxim applie cases like the present, where the contributory negligence of injured person is relied on as an answer to a proven charge negligence against a defendant.

The subject of negligence and of contributory negligence, an the burden of proof on the plaintiff and on the defendant resp tively, in an action for negligence, was dealt with in a conside judgment of this Court in the case of *M'Kinnon* v. *Morris* (*b*). adhere to, and adopt as part of my judgment in the present c the opinions there expressed by the Court. Negligence on part of a defendant, and contributory negligence on the part of injured person, are questions of fact and not of law, and a plaint claim in an action for negligence cannot be withdrawn from jury unless, first, no evidence proper to be submitted to the jur negligence of the defendant materially contributing to the in (See *per* Lord Watson and Lord Blackburn in *Wakelin* v. *Lon and South-Western Railway Co.* (*c*)) has been offered by plaintiff; or, secondly, no such evidence has been given either the plaintiff or by the defendant (on whom the burden of prov affirmatively that there was contributory negligence rests in first instance: see same case, at page 47), except what necessa goes to show that the negligence of the injured person himself been the efficient cause of his injury. The fact that the proxim cause of the injury was the voluntary act of the injured per himself is not conclusive of contributory negligence, and does

(*z*) L.R. 8 Q.B. 161.
(*a*) L.R. 4 C.P. 739.
(*b*) 11 V.L.R. 179-81.
(*c*) 12 App. Cas. 48.

withdrawal of the case from the jury. To justify the taking that course it should appear, beyond reasonable the undisputed facts of the case, that the injury naturally from the negligent act or default of the defendant would occurred but for a voluntary act or default on the part of d person, either unlawful in itself or indicating a want of and caution which might, under all the circumstances, ng regard to the age and physical health and strength, condition of the faculties of the injured person at the reasonably expected from him: *M'Kinnon* v. *Morris* (*d*). this rule to the facts of the present case, I do not t the judge could have withdrawn the question of con- negligence from the jury. The act of the deceased in is head out of the window, though a voluntary act, was lawful act, neither was it an obviously dangerous act. It have been dangerous at all but for the negligence of the s, of which the deceased was entirely ignorant. It is e under the circumstances that it was even an act of llessness or incaution. It is far more probable that it t necessitated and justified by sudden illness. It could rmed, I think, that the evidence went necessarily to show gence of the deceased was the cause of his death, or that sed had been guilty of any negligence at all, and the right therefore, in my opinion, in sending the case y.

notion for a new trial rests on four grounds. The first the same as the second ground taken on the appeal he judgment. The second ground charges it as a mis- that the learned judge directed the jury that it was a for them to decide whether the deceased in protruding his body from the carriage was acting with ordinary and caution, or whether it was an act which should be l as an act done at his own peril, a negligent act, an act in itself a risk which he might suppose he would run. ground alleged that the judge should have directed the the deceased in protruding his head and part of his body e carriage did so at his own risk. I am of opinion, for

(*d*) 11 V.L.R., p. 180.

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the reasons I have stated, that the judge's directions were subst
tially correct. The fourth ground of the motion is that the findi
of the jury were against evidence and the weight of evide
There was evidence, in my opinion, on which the jury could
reasonable men, find that the deceased was not acting negligen
in putting his head out of the carriage window in the way he
and that the door which struck him was left open by the neglige
of the defendants' servants. No evidence was given by the de
dants as to when, or how, the door became open. There is
doubt that it was open when the two trains met, and that f
unexplained, was sufficient to justify the second finding.
jury were at liberty to conclude that the door had not b
completely fastened at the Essendon station, or that, owing to
imperfection of the lock, it had been shaken open by the motio
the carriage. In my opinion, the defendants' appeal against
judgment should be dismissed, and the motion for a new t
should be refused, with costs in each case.

HOLROYD, J. The Railway Commissioners are common carri
and their contract with a passenger travelling by any of t
railways is to carry him safely and securely thereon. To
obligation there is not in my opinion any such condition attac
by law as that the passenger shall keep the whole of his b
within the body of the carriage. Railways as well in Englan
in this colony have usually been so laid as to allow ample r
between any two sets of rails, or between carriages travelling on
line and posts bridges or other erections on the side of the r
The class of carriage in which a passenger is to travel is determ
ordinarily by the ticket which he takes. Carriages of different cla
differ in construction, and carriages of the same class are vario
constructed at different times and places. Third-class carri
were once not much better than open trucks. Some first-c
carriages are built with a platform at one end, on to which
passenger can walk, and where he can stand protected only b
single rail, which, when the carriage oscillates, he is freque
compelled to grasp tightly to prevent himself from falling.
Victorian first-class carriages are generally so constructed
passengers can put their heads or lean their bodies out of

window, or sit with their elbows protruding, and there is nothing about them to indicate that those who do so will incur any danger. From the fact that a vehicle is roofed over, one is not forced to presume a condition that a passenger shall, in case of accident, forfeit the benefit of the contract to carry him safely unless he keeps his whole body beneath the roof. A hard and fast rule, turning a railway carriage into a prison van, seems to me contrary to common sense; and I should not therefore imply it without distinct authority. An act which may be very prudent on one occasion may be extremely incautious on another. Under certain circumstances it may be rash to stand up when the train is in motion, very rash to lean with your back against the door; but it is no part of the contract that passengers shall sit down until the train stops, although seats are provided for them. Circumstances may arise too, in which it may be not only discreet but even a duty for a passenger to put his head out of window. If he feels sick, is he to pollute the carriage and his neighbours for fear of breaking his agreement? The carrier's responsibility is always limited. He is answerable only for the negligence of himself and his servants. If the passenger's own negligence is the efficient cause of an accident, the carrier is not responsible. But in discussing a question of negligence every variety of situation and circumstances may have to be considered. I think that the jury in this case were rightly directed by the learned judge. If there had been anything in the construction of the carriages to suggest that it would have been dangerous to lean out of window, if any notice had been posted warning people against the risk, if any by-law had been made on the subject, these things, of none of which was any evidence given in the present case, might have been and should have been considered by the jury in arriving at their verdict. I have felt some doubt whether the verdict could be sustained; but upon the whole I think there was evidence proper to be submitted to the jury. I concur therefore with the Chief Justice that the appeal should be dismissed, and the motion for a new trial refused, with costs.

WILLIAMS, J. The facts of this case are very simple, so far as they are material to the point upon which I base my judgment.

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The deceased was a passenger in the defendants' train f Melbourne to Essendon; he was travelling by night. After train had left North Melbourne he rose from his seat, and for s purpose unexplained put his head out of the window, accordin the plaintiff's version, a distance of 7½ inches, according to defendants' version, 11½ inches. While the deceased was in position, and the train was speeding towards the next stat another train of the defendants' passed on another line of r Between the the two sets of rails there was a way of 6 feet cl A door of one of the carriages of the passing train on the side to the train in which the deceased was a passenger was open, this open door struck the deceased on the head, and killed him.

It was admitted both at the trial and during the argument be us that this open door in no way interfered with the passage of train in which the deceased was a passenger, and that the dece could have suffered no injury from this open door had his head been projected out of the window. It was evidently suggested at trial that the deceased had put his head out of the window to vo but if this be material, not only is it unsupported by evidence, what evidence there is negatives the hypothesis. I refer to evidence of Horner for the plaintiff and of Boswell for defendants, the only two passengers in the carriage who were ca to give evidence, and there is no evidence that any trac vomiting was found upon the footboard or upon any part of carriage. We have therefore the simple facts—(1) That deceased rose from his seat when the train was in motion, voluntarily and for no assigned purpose projected his head ou the window to a substantial extent; (2) that while he was in position the open door of a passing train struck his head and k him; and (3) that that door when opened to its widest extent i way interfered with the clear passage of the train in which deceased was a passenger.

Upon these facts, as to which there is substantially dispute, the question arises, and arises I believe for the time in English courts, whether the plaintiff can, as the re sentative of the deceased, maintain an action against carriers. For the purpose of considering this question, I ass that there was evidence of negligence on the part of the defend

in respect to the open door of the passing train. Assuming this, the proposition that I have to consider appears to me to be this—Was the injury to the deceased caused by the neglect of any duty which the defendants owed to the deceased? What was the duty owed to the deceased by the defendants? To convey him in a carriage of the train by which he was a passenger from Melbourne to Essendon with all reasonable despatch, care, and caution; to provide him with a seat in a reasonably safe and secure carriage; to manage the train in a reasonably safe and proper manner; and to use all reasonable means to keep a fair way for the passage of that train; and if by any neglect of that duty the deceased had met his death, his representative would undoubtedly be entitled to hold the defendants responsible for the consequences. But I am unable to discover any duty on the part of the defendants to take precautions for the safety of a passenger who voluntarily projects part of himself outside the carriage in which the defendants have contracted to carry him, against dangers which may befall him by reason of such projection, dangers perfectly innocuous to the train and to the passengers in that train as long as they keep themselves within the train. I use the word "voluntarily" advisedly, for, if the passenger is by any act, conduct, or default of the defendants induced or invited to thus project, or excused from thus projecting himself, then a duty arises on the part of the defendants to take reasonable precautions to protect him against danger, as, for instance, if a passenger has occasion to communicate with the guard by means of communication placed outside the window; if, while he is reasonably engaged in this act, he were to be struck by the open door, negligently so left, of a carriage of another of the defendants' trains which happened to be passing at the time, the defendants in such a case would be responsible; so, if a collision between two trains of the defendants were imminent through faulty management on the part of the defendants, and a passenger, in order to escape from the consequences of the impending crash, were to leap out through the window, and in so doing injure himself, he would be entitled to recover, because by default of the carrier he would be held to be excused. I do not dispute the right of a passenger to rise from his seat and lean out of the window if he likes to do so; all I say is, that if he chooses to do an act outside the carriage which may be

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dangerous, he does that act at his own risk, unless he has induced or invited to do, or is excused from doing, that act by re of some inducement, invitation, conduct, or default of the defend Subject to this qualification, there is no duty arising out of passenger's contract cast on the defendants to take precaution his safety while he is in that position. If this be so, the pla has failed to establish in this case that the deceased met his d by reason of the neglect of any duty which the defendants owe the deceased, and the undisputed facts do establish that deceased voluntarily, and for no explained purpose, exposed hi to a danger, for the calamitous consequences of which he ca legally hold the defendants responsible.

The most forcible portion of the argument addressed t for the plaintiff is to my mind this—that it was part of defendants' contract with the deceased that he was to b liberty to make any reasonable use that he pleased of carriage in which his ticket qualified him to travel; that defendants are obliged to take reasonable measures for his s while making such reasonable use; and that whether his use in projecting part of his body out of the window was reasonab not, is a question for a jury. I might perhaps subscribe to proposition that a passenger is at liberty to reasonably use carriage *in* which the defendants have agreed to carry him wit relieving them from responsibility. Such a user may b implied term of the contract, but in my opinion that doc cannot be extended to an act done outside the carriage, or to a done partly inside and partly outside. Testing the proposition forward for the plaintiff by an extreme case—if a passenger we project himself out of the window to such an extent as to leave his feet inside, it would be a question for a jury whether that reasonable user of the carriage or not, and if a jury could be f to say that it was, the defendants might be held legally liable.

Less forcible was the contention that the defendants ar blame for the accident because they had not placed bars a apertures, made for the admission of light and air, so as to pre passengers putting their heads or bodies out of the windows know of no obligation upon them to do an act which migh moments of great peril obstruct, under certain circumstances

lable means of escape. Nor can I attach weight to the on that the defendants are liable because they had not notices in the carriages warning passengers that it was s to project their bodies or heads out of the windows. ight be special circumstances which might cast upon a ompany the burden of giving such a notice, but no such ances are proved to have existed in the present case, and I now that the law has yet thrown upon railway companies of dry-nursing the travelling public. If the defendants eld liable for this accident, so could they be held liable if a r in a train proceeding through a tunnel which was being were to lean out of the window to ascertain if he could see end of the tunnel, and whilst thus gratifying his curiosity be struck by scaffolding which in no way impeded the fair of the train. I think that this appeal should be allowed, s, and that judgment should be entered for the defendants. ire, however, to add that the point raised in this case never to have been decided in any English court. It has uently the subject of decision in American courts, and the those decisions appears to be in favour of the conclusion I have arrived, though the reasoning upon which those are based is apparently not upon the line upon which I ceeded. I have not overlooked the case of *Gee* v. *Metro-Railway Co.*, but the decision in that case was upon a facts altogether different from the facts in the case I am idering. A reference to the facts as stated by Martin, B., of the report, establishes the accuracy of this observation. B., there observes: "In this particular case what occurred : The man was sitting in the carriage; he meant to look e window to see if certain lights were visible, but *before* he hing of this sort, by merely putting his hand on the bar, flew open, and the man met with the accident. It might urred if he had intended merely to shift his seat, if he had lly put his hand upon the bar." The only comment that it necessary to make upon that case is this: that in that defendants were clearly guilty of a breach of duty to their r, namely, of the duty to have and maintain the carriage in travelled in a reasonably safe and secure condition, and

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that it was by reason of their negligent non-observance of that d
that the plaintiff sustained injury.

I regret that I differ from the views of my two learned breth
in the Court of Appeal, and from those also of the learned prin
judge; the fact that their views are opposed to mine m
diminishes the confidence that I otherwise would feel in
soundness of my judgment.

Solicitor for appellants: *Guinness*, Crown Solicitor.
Solicitor for respondents: *Gillott, Croker & Snowden.*

W. H. M

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Building contract—Contract under seal—Departure from contract—Parol v tion fully performed—Provision for employment of particular architect provision for another architect in case of inability to act—Implied condit Condition precedent—Novation of contract—Nudum pactum—Variatic contract—Errors of account.

The plaintiff did certain work and supplied certain materials, in the erectic a factory for the defendants, under two contracts under seal, and also did ce extras in connection therewith, and he claimed and was paid 663*l.* 7*s.* 9*d.* in e of what, in the opinion of a referee to whom the case was referred, was due to him under the contracts. Under the first of the contracts under w most of the work was done Nahum Barnet was to be the architect, an provision was made for the appointment of another in the event of his unable or declining to act. Payments were to be made on the certificate o architect. Barnet never acted as architect, but one John H. Grainger, by the direction of the defendants, and with the knowledge and acquiescence of the pla from the commencement to the end of the work, actually superintended the and performed the functions of architect. The plaintiff dealt with him as throughout the whole of the work. The above amount was certified to by Gra as the architect.

Held, that even supposing there to have been a departure from the sealed tract, that did not avoid Grainger's certificate, for either the departure wa wrongful act of the defendants to which the plaintiff submitted and of which had had the full benefit, or the terms of the deed were varied by a parol agree between the parties, valid in equity, and the contract so varied was fully perfo by the plaintiff.

Held further, that the first contract being based on the assumption that B would be willing and able to act as architect, contained an implied condition th should only have effect in that event, and that the substitution of Grainge Barnet was no departure from the original contract, but a new agreement, ado the terms of the original contract, with Grainger's name inserted in it in pla Barnet's.

g contract under seal provided that the builder should be paid by the
m time to time, after the expiration of seven days after the architect's
the amount had been presented to them. After the presentation of the
tificate, but before the seven days had elapsed, the employers gave their
te to the builder for 4,080*l.* 4*s.* 6*d.*, and he signed the following document
t not under seal:—"Dear Sirs,—In consideration of your giving me
ory note for 4,080*l.* 4*s.* 6*d.*, being the balance claimed by me in respect
ct for buildings on the Yarra Bank, I hereby agree that I will not ask
ent on account of my contract for the chimney and other works at the
until they are completed, and accounts passed by Mr. Clarkson, clerk
l that if any error be found by you in the account for which the said
ote is given, any amount over-paid may be deducted by you from any
ome due to me under the contract for the chimney and other works."
t it was to be presumed from the builder's taking the note that it was
to him, although the amount had been certified by the architect, and
ement was therefore good, notwithstanding that it departed from the

, that such agreement contemplated the correction of not merely
he addition of figures, but other errors in the account, such as charges
executed, or materials not supplied, or for things already charged for,
d not contemplate that the judgment of the architect should be inter-
nd did not therefore apply to the quality of work or materials, or to
ce or deduction should be made in respect thereof.

for judgment upon a referee's report.

tion was brought by Moore against Fergusson for
5*d.*, and interest at 6 per centum per annum, for work
done and materials provided by the plaintiff for the defen-
is request, and for money found to be due on accounts
Another action by Moore against Fergusson & Mitchell
nt for work done and materials provided by the plaintiff
endants at their request, and for goods sold and delivered,
nterest upon money due from the defendants to the
nd for money due on accounts stated. The amount
this action was 1,616*l.* 13*s.* 8*d.*—less 37*l.* 17*s.* 6*d.*
made by defendant's architect, less 1,000*l* cash on
ss 59*l.* 15*s.* on contra account by stationery supplied by
to plaintiff, leaving a balance due to the plaintiff of
d. On this amount the plaintiff also claimed interest
ntum per annum.

two actions were consolidated, and a defence and counter-
e consolidated actions was put in. The defence stated:—

e year 1888 the plaintiff did certain work, and supplied certain materials
dants under a contract in writing for the erection of a factory, and was
amount he claimed therefor.

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"2. The defendants have since discovered as the fact is that the plaintiff was paid a sum largely in excess of the sum really due. Particulars—Amount of overcharge as follows."

Then followed a number of items showing the alleged overcharges to amount to 1,001*l.* 8*s.* 6*d.*

"3. At the time when the defendants paid the plaintiff for the said work it was agreed, that if the defendants found any error in the said account so paid, any amount overpaid might be deducted from the amount now sued for.

"4. The plaintiff is also indebted to the defendants for goods sold and delivered by the defendants to the plaintiff. Particulars—68*l.* 6*s.* 6*d.*

"5. The defendants claim to set off the said two sums of 1,001*l.* 8*s.* 6*d.* and 68*l.* 6*s.* 6*d.* against the plaintiff's claim."

The plaintiff's reply was :—

"1. Except as to paragraph 4 he joins issue.

"2. As to the said sum of 68*l.* 6*s.* 6*d.* mentioned in paragraph 4 he says that he admits the same, but as to the sum of 59*l.* 15*s.*, portion thereof he says he has already given the defendants credit for the same in the abovementioned action, and the defendants are consequently not entitled to set off the said sum of 59*l.* 15*s.*"

After the close of the pleadings an order of reference was obtained by consent, and the case referred to a referee, who reported as follows :—

"As to the issues raised by paragraph 1 of the defence and counterclaim I report that the plaintiff did in the year 1888 do certain work, and supply certain materials, for the defendants under two contracts under seal, and dated respectively 25th May 1887 and 20th September 1887, and also certain extras done in connection with such contracts, and the plaintiff was paid the full amount he claimed in respect thereof.

"2. As to the issues raised by paragraph 2 of the defence and counterclaim that the plaintiff was paid a sum in excess of the sum that was really and properly due, I find that the sum of 66*3l.* 7*s.* 9*d.* was so paid in excess.

"3. As to the issues raised by paragraph 3 of the defence and counterclaim, I report that the plaintiff did on the 21st day of December 1888 agree that if the defendant should find any error in the account so paid any amount overpaid should be deducted from the amount now sued for by the plaintiff, and signed the following document :—

"Melbourne, 21st December 1888.

"Messrs. Fergusson & Mitchell.

"Dear Sirs,—

"In consideration of your giving me your promissory note for 4,080*l.* 4*s.* 6d., being balance claimed by me in respect of my contract for buildings on the Yarra Bank, I hereby agree that I will not ask for any payment on account of my contract for the chimney or other works at the said buildings until they are completed and accounts passed by Mr. Clarkson, clerk of works, and that if any error be found by you in the account for which the said promissory note is given that any amount overpaid may be deducted by you from any money to become due to me under the contract for the chimney and other works.

"(Sd.) JAMES MOORE."

"4. As to the issue raised by paragraph 4 of the defence and counterclaim that the plaintiff was indebted to the defendants for goods sold and delivered by the defendants to the plaintiff, I find that the plaintiff is indebted to the defendants in the sum of 8*l.* 11*s.* 6*d.*"

The report was subsequently remitted to the referee for further consideration, with a direction to state any points of law that were raised before him, and to find specially such facts as might be necessary to determine the whole case according to the view which the Court might take on these points. The referee accordingly further reported as follows:—

"I find the following special facts:—1. The amount claimed by plaintiff under the contracts in writing referred to in paragraph 1 of the defence was certified to by John H. Grainger as the architect, and was paid by the plaintiff in full and included all the items set forth in the columns headed 'Defendants' charges,' in the particulars at the foot of paragraph 2 of the defence.

2. Portion of the work so claimed for was included in the contract of 25th May 1887, and other portions were not included in the contract or either of them but were in my opinion charged at an excessive price, and for such other portions I have allowed what I consider a fair charge. All my findings are set out hereunder, together with special remarks and findings as to certain portions of the work."

Item.	Description of Work.	Plaintiff's Charges.	Special Remarks.	Full Amount allowed by Referee.

(The items set forth showed that the plaintiff had in the referee's opinion overcharged to the total amount of 663*l.* 7*s.* 9*d.*, including charges made for work not executed, materials not supplied, and double charges to the amount of 86*l.* 11*s.* 6*d.*)

"3. At the time when the defendants paid the plaintiff the amount of his said claim there was an agreement dated 21st December 1888 entered into between them, which was put in evidence before me and is set out in paragraph 3 of my former report.

4. The sum of 59*l.* 15*s.* mentioned in paragraph 2 of the reply was credited to the defendants by the plaintiff in his claim.

5. From and after the commencement of the work, viz., 20th September 1887, and down to the end of the work, the person actually superintending all works and performing the functions of architect thereto was John H. Grainger.

6. The plaintiff knew of and acquiesced in the said John H. Grainger so superintending all the said works and performing the said functions, and dealt with him as such architect throughout the whole of the work.

7. The said John H. Grainger so superintended the work and acted as architect in relation thereto throughout the whole of the work by the oral direction and with the knowledge and consent of the defendants.

8. Except as aforesaid there was no appointment of any person as architect other than the appointments contained in the contracts of 25th May 1887, and 20th September 1887.

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The points of law raised before me were as follows :—" (1.) Counsel on beh the plaintiff contended, first, that the work was done under agreements unde and that the rights of the parties under the agreements under seal could no matter of law be varied by a mere writing such as the third agreement, bei said agreement of the 21st December 1888, and that therefore the third agre was inadmissible in evidence. And (2) that if the said third agreement was sible its meaning was simply that if any patent mistake was discovered it sho corrected, but not that where it was a question of amount or allowance or qual judgment of some third power should be substituted for that of the architect the contract.

On behalf of the defendants it was contended, first, that the above point not open on the pleadings; and, secondly, that they were not tenable. Coun the plaintiff asked that I should amend the pleadings if necessary, and th objected to. I declined to exercise my jurisdiction (if I possessed any) as to a ment."

Both the plaintiff and defendants moved for judgment o reports.

Madden and *Mitchell* for the plaintiff.

Isaacs and *Bryant* for the defendants.

Cur. adv. vul

HOLROYD, J. The only materials that I have properly b me upon which to found my judgment are, besides the plead which could be amended if necessary, the two reports of the re and the two contracts annexed to his first report as therein s and thereby made part thereof. A number of exhibits were and commented upon, which, however useful to enable me readily to apprehend the subject matter of the controversy bet the parties, I am bound to discard absolutely in performin functions as judge. I am no more entitled to regard exhibi made part of the referee's reports than any of the oral testi adduced before him. When the cause came on for hearing before any evidence was taken or point of law argued, it was b consent of the parties ordered that all the issues of fact i consolidated actions should be tried by the referee; and he m report, which was subsequently remitted to him for further sideration with a direction to state any points of law that raised before him and to find specially such facts as migh necessary to determine the whole case according to the view the Court might take on those points. The second report the points of law that were raised before the referee and

certain facts specially; but I must still keep the first report under consideration, because the second does not reject it but upholds it while explaining its meaning. The Court was not moved to set aside or remit the second report, and my duty is now to determine those points of law, and those only, which were raised before the referee, or which arise upon the pleadings or upon the referee's special findings, and subject thereto to accept his findings upon the issues as conclusive.

By his first report the referee found that the plaintiff did certain work and supplied certain materials for the defendants under two contracts under seal, dated respectively 25th of May 1887 and 20th of September 1887, and also did certain extras in connection with such contracts, and that he claimed and was paid in respect thereof a sum which was 663*l.* 7*s.* 9*d.* in excess of what was really due to him. In his second report the referee explained that the amount claimed by the plaintiff included all the sums set forth in the column headed "Defendants' charges" in the particulars at foot of paragraph 2 of the defence; that this amount was certified to by John H. Grainger as the architect; that from the commencement to the end of the work the person actually superintending all works and performing the functions of architect in relation thereto was John H. Grainger; that the plaintiff acquiesced in Grainger's superintendence, and dealt with him as architect throughout; and that Grainger so superintended and acted with the knowledge and consent of the defendants and by their oral direction. By "certified" I must understand the referee to mean properly certified, no objection having been taken to the form of the certificate. The heading "Defendants' charges" in the particulars in paragraph 2 of the defence is an obvious blunder. It should be read "Plaintiff's charges." The referee further explained that portions of the work were not included in either of the contracts, by which he obviously meant not included in the contract price, and that for such portions he had allowed what he considered a fair price. It was contended for the defendants that the plaintiff's alleged overcharges for extras related to extras done in connection with the contract of the 25th of May, as would appear to be the case, at least with respect to most of them, and that under that contract Nahum Barnet was the architect, no provision having been made for the appointment of

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another architect in the event of his being unable or declining to act, and that consequently upon the issue as to overpayment, apart from the agreement set up by the third paragraph of the defence, Grainger's certificate went for nothing, inasmuch as the substitution of Grainger as architect in the place of Barnet was a departure from the sealed contract. The referee has not expressly stated that this point was raised before him, but his special findings indicate that it must have been brought under his notice. It was so little pressed, that I have scarcely had the advantage of hearing argument either for or against it. If however there was a departure from the sealed contract, the answer is; either that the departure was the wrongful act of the defendants to which the plaintiff submitted, and of which they have had the full benefit—See *O'Keefe* v. *The Board of Land and Works* (*a*); *Ford* v. *Young* (*b*)—or that the terms of the deed were varied by a parol agreement between the parties, valid in equity, and that the contract so varied was fully performed by the plaintiff: See *Nash* v. *Armstrong* (*c*); *Frogley* v. *The Earl of Lovelace* (*d*); and compare *The Thames Ironworks Co.* v. *The Royal Mail, etc., Co.* (*e*). But the contract of the 25th of May, as I read it, is based upon the assumption that Barnet would be able and willing to act as architect, and I think it contains an implied condition that it should only have effect in that event. It is not an unfair inference from the conduct of the parties that Barnet either could not or would not act. Thence it follows that the substitution of Grainger for Barnet was no departure from the original contract, but a new agreement, rendered necessary by the failure of the original contract, and adopting its terms with Grainger's name inserted in place of Barnet's.

I have next to consider the effect of the agreement averred in the third paragraph of the defence, which was put into writing and signed by the plaintiff, but not sealed. It is set forth at length in the referee's first report, and is as follows:—

"Messrs. Fergusson & Mitchell, "Melbourne, 21st December 1888.

"Dear Sirs,

"In consideration of your giving me your promissory note for 4,080*l.* 4*s.* 6*d.*, being the balance claimed by me in respect of my contract for buildings on the Yarra

(*a*) 1 A.J.R. 145.
(*b*) 8 V.L.R. (L.) 93.
(*c*) 10 C.B. (N.S.) 259, 262, *per* Willes, J.
(*d*) John. 333.
(*e*) 8 Jur. (N.S.) 100.

Bank, I hereby agree that I will not ask for any payment on account of my contract for the chimney and other works at the said building until they are completed and accounts passed by Mr. Clarkson, clerk of works; and that if any error be found by you in the account for which the said promissory note is given, any amount overpaid may be deducted by you from any money to become due to me under the contract for the chimney and other works.

"JAMES MOORE."

To defeat this agreement the plaintiff's counsel in his turn availed himself of the common law doctrine, and insisted that the document was inadmissible in evidence as contravening the deed. I am not of that opinion. It may certainly have been a benefit to the plaintiff to get the promissory note, although the amount of it had been certified by the architect as payable. The defendants were not bound to pay the amount until the expiration of seven days after the architect's certificate had been presented to them. From the plaintiff's taking the note I presume that the giving of it was an advantage to him, and the agreement was therefore good, notwithstanding that it departed from the deed. But upon the construction of the agreement I adopt Mr. Mitchell's argument to a great extent, though not entirely. As to the quality of work or materials, as to how much should be allowed for particular extras, as to whether one kind of material had been properly supplied in lieu of another, and what allowance or deduction should be made in respect thereof, I think it was not meant that the judgment of a third person should be substituted for that of the architect. These questions all necessitated the exercise of discernment. But I think it was meant that something more than mere mistakes in the addition of figures should be corrected. If in the account there were charges for works which had never been executed, or for materials which had never been supplied, or if the same thing was charged for twice over, those were, strictly speaking, errors in the account, and quite different from errors of judgment on the part of the architect. If, as was to be presumed, the architect had done his duty honestly, they were mere oversights, and I think the parties contemplated that they should be corrected. Thus interpreting the agreement of the 21st of December 1888 the defendants are entitled under the 2nd and 3rd paragraphs of the defence to set off against the amount sued for the sum of 86*l.* 11*s.* 6*d.* Under the

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4th paragraph of the defence the defendants are further entitle set off the sum of 8*l.* 11*s.* 6*d.*, as to which there has beer dispute. The set-off reduces the plaintiff's claim to 423*l.* 18*s.* and I direct judgment to be entered for the plaintiff for amount, with costs of the action excepting the costs of the tris the referee, and I order that the parties respectively abide their costs of that trial.

Solicitors for plaintiff: *Gillott, Croker & Co.*
Solicitors for defendants: *Davies, Campbell & Davies.*

A. J.

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Holroyd, J.

IN THE WILL OF THE RIGHT REVEREND CHARLES PERRY, BISHOP OF MELBOURNE.

Probate practice—Duplicate wills—Evidence of identity—Alterations and obl tions—Examination with microscope—Name in full of attesting wit Residence of attesting witness—Solicitor—Solicitor's clerk.

Where the Court was asked to grant probate of duplicates of a will and codicils it refused to act on the affidavit of one of the applicants that they identical with the originals in England where such applicant could only have k by information received from England that they were, but required an affidavit someone who could speak of his own personal knowledge either to that fact facts which would go to prove it.

Where there are a number of alterations and obliterations in a will and there extrinsic evidence to show when they were made, the Court will allow the will examined by some expert with a microscope with the view of establishing the f possible.

On an application for probate of a will the Court requires the full name of attesting witness to be given, and the residence of each witness at the time the aff is sworn, or if that cannot be ascertained then the last known place of residence

The evidence given should be such as to enable the witness to be found as and expeditiously as possible, even after a lapse of years. A solicitor's pla business is a sufficient description of his residence, but the place of business master is not sufficient in the case of a solicitor's clerk, even though he be emp thereat.

MOTION for probate of the will and three codicils of Ch Perry, deceased, formerly Bishop of Melbourne.

The facts sufficiently appear from the judgment.

Weigall in support of the motion.

Cur. adv. vult

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OYD, J. On the 3rd of this month Mr. Weigall moved
to grant probate of a will and three codicils of Charles
eased, formerly Bishop of Melbourne. These documents
ed to be duplicates of a will and three codicils left by the
and intended to be proved in England.
estator died in England on the 2nd of December 1891. By
f which probate is sought Henry Henty, Thomas A'Beckett,
am Edward Morris are appointed executors and trustees as
tator's property in Australia, and certain other persons
med are appointed executors and trustees as to all his estate
s excepting his Australian property. Mr. Morris has made
it, in which he says that after the death of the deceased
ed from Sydney Gedge Esquire (one of the testator's
executors, and a member of the firm of Gedge, Kirby &
no had been the testator's solicitors in London, and whom
ill he directed to be employed as solicitors to his estate) a
m which the following are extracts :—

hop" (meaning the late Bishop Perry) "made a will and three codicils
, leaving one part in my care and keeping the other himself, and it has
tention to prove one part here and to send you the other. But hitherto
or the other part amongst his papers has been fruitless. I can only find
odicil, and if the original will and two codicils are not found I suppose it
sary to send you an official copy of the probate when the other originals
roduced. Meanwhile I send for your information an examined copy of
codicils."

letter Mr. Morris received a document containing what
to be copies, though not fac-similes, of the will and
which I have been asked to grant probate. Subsequently
d a further letter from Mr. Gedge, enclosing that will and
icils. Mr. Morris deposes that he has himself examined
and those codicils with the documents containing the
nt out by Mr. Gedge, and finds that they are identical.
tates that the copies are examined copies of the originals
d, but this he could not know except from the information
obtained from Mr. Gedge. There is no such evidence
as the Court is in the habit of acting upon to show that
ments sent out here as examined copies of originals in
are what they have been stated to be; or otherwise to
at is alleged, that the will and three codicils of which I

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have been asked to grant probate are in reality duplicates. In
own mind I have not the least doubt about the matter; but
Court has always been accustomed, and I think very properly
require an affidavit from someone who can speak of his own pers
knowledge either to the fact which it is sought to prove or to f
which go to prove it. In the case of *John Cust* (*a*), a testator,
died possessed of property in Victoria and also in New So
Wales, had executed duplicate wills, his object being to en
probate to be obtained in each colony as of an original docum
The Court granted probate of one of them, directing the fac
there being a duplicate to be specially mentioned in the grant.
there the existence of the duplicate was mentioned in the testa
of each will, which ran thus—"In witness whereof I the said J
Cust, the testator, have hereunto and to a duplicate hereof set
hand, etc."; nor have I any reason to suppose that the u
affidavit, showing the document not before the Court to b
duplicate, was in that case dispensed with.

The will submitted for probate contains a number of in
lineations and other alterations, mostly very insignificant.
appears to have been written with a typewriter, and a g
many misspellings have been corrected by striking out let
or writing one letter over another. Some of the alterat
have been initialled by the testator. "Candlebrum" has
cancelled and "Candelabrum" written over it on the first p
page of the will. On the fifth page the word "my" has been str
through, and the word "any" written over it, so that the sent
runs now—"And my Australian trustees shall pay to my wife
sums standing to my account or current account in any ban
Australia at the time of my death," whereas it read before, "in
bank in Australia." On the sixth page the word "anything"
been interlined to come between the words "notwithstanding"
"herein contained." The last line of the seventh page has
struck out, and the first line on the eighth page inserted. T
are the only alterations that have been initialled, and in my opi
none of the others are of any importance. One of these, and
one, might be so, viz., the change of the word "my" into "any
it should turn out that at the time of the testator's death there

(*a*) 9 V.L.R. (I.) 54.

sums of money standing to his account or current account in more banks than one in Australia. There was no extrinsic evidence to show at what time the interlineations and obliterations appearing on the face of the will were made, and when that is the case the presumption usually is that they were made after the execution of the will. The will itself affords no clue to the time when they were made except in the nature of the alterations. It is certainly more probable that the mistakes of the typewriter should have been corrected before than after the execution of the will. In the will of *Purvis* (*b*), Mr. Justice Molesworth said :—

"The will was prepared and engrossed by a solicitor in town, who sent it to the testator, and the testator expressed to him an intention of altering it. The attesting witnesses say that just before its execution the testator in their presence initialled various interlineations and alterations in the will, but that they cannot identify such, but believe that the will, when executed, was in its present state. It was not read. There are a number of interlineations in the will, all marked with the testator's initials, also of obliterations, none of them so marked, but some of them corresponding with the interlineations, that is, words rendered unfit by the interlineation. As far as I can judge, the interlineations, the obliterations, and signatures of execution were written with the same pen and ink and at the same time. I think that this affords sufficient evidence to enable me to admit to probate the document with all initialled interlineations, excluding all obliterations the beginning of which is under an interlineation."

"Obliterations" in the above extract means "words attempted to be obliterated"; and the case is an authority for admitting initialled alterations to probate where some were made previously to execution and all appear to have been made at the same time. The will of the late Mr. Justice Stephen was a holograph will, containing some very trifling alterations, and the Court granted probate with the alterations: *Re Stephen's Will* (*c*). The judge there, following the case of *In re Hindmarsh*, looked at the will for himself, and concluded that the alterations were made at the time when the will was written, in which opinion he was fortified by the evidence of an expert who had examined the will. In the will of *Armstrong* (*d*), Mr. Justice Molesworth granted probate of a will as altered where the alterations were absolutely unimportant, although no witness was found who could depose whether they were made before the execution of the will or not, but one of the witnesses swore that they were in the handwriting of the testator. This case comes nearer to the present than any other which I have been able

(*b*) 3 V.L.R. (I.), p. 39. (*c*) 7 V.L.R. (I.) 69. (*d*) 6 A.L.T. 48.

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to discover, but is not exactly parallel. Were I to grant probate of this will I should be disposed to grant it with all the alterations excepting those which have been initialled, unless it could be proved to my satisfaction that the minor corrections had been made at the same time as the initialled ones; and I would allow the will to be examined by some expert with a microscope, with the view of establishing that fact, if possible: See *Re Riddell's Will* (*e*).

But besides the defective evidence as to the testamentary papers alleged to be duplicates, there are other objections to the granting of probate. In the affidavit of the executors the full names of the attesting witnesses are not stated, and the place of his employment is given as the residence of one of them, an articled clerk. This may seem a small matter, but it is not so by any means. The fourth rule of the *Regulae Generales* of the 23rd of June 1873 directs that every application for probate of a will, or for administration with the will annexed, shall be supported by an affidavit or affidavits, setting forth amongst other things the name and residence of each executor and of each of the subscribing witnesses thereto. The object of the rule as to the witnesses is, that in case after the will has been proved in common form, the executor should be called upon by any party interested to prove the will in solemn form *per testes*, it should be possible to discover as easily and expeditiously as possible where the attesting witnesses may be found. The necessity of procuring their evidence may arise after many years; and I think it important that the rule should be complied with as strictly as it can be. The name of a witness is his full name. Residence is a word of variable meaning. Primarily I think it signifies a place where a man has his home, which would usually be where he slept. After a lapse of time inquiries as to the whereabouts of a solicitor would most probably be satisfactorily answered at his former place of business; and I should accept the place of business of a solicitor as a sufficient description of his residence. But a solicitor's clerk may shift his residence to any part of the world, and no record be kept in the office of what has become of him, and in his case I should not consider the place of business of his employer a sufficient description. The residence to be set forth is in my opinion the residence at the time when the

(*e*) 6 V.L.R. (I.) 5.

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is sworn; or if that cannot be ascertained, then the last-place of residence. When after reasonable endeavours to the necessary information the executors find themselves to comply with the rule strictly, they should state in their the grounds on which they ask that compliance may be d with. A dispensation on one ground is apt to lead to ions for dispensation on different grounds, and an argument ly ensues as to how far the Court can safely permit a e from established practice, even when the departure has casioned by neglect or inadvertence. The late Sir Robert rth, who may be said to have moulded the whole practice robate jurisdiction of the Court, uniformly required that the ne and residence of the attesting witnesses should be when possible; and I myself, and I believe other judges, nsistently followed his ruling: See *Re Cook* (*f*); *Re* (*g*); and the following unreported cases, with which I have ndly furnished by the Registrar, viz.:—*Re Patrick n*, 9th March 1882; *Re Isaac Watson*, 9th February 1882; *ust Freitag*, 13th April 1882, before Molesworth, J.; *Re McAskill*, 23rd August 1888; *Re Patrick Gleeson*, ne 1890; *Re William Eckersley*, 30th August 1883; *Re Davis*, 16th August 1888; *Re Duncan Ewens*, 16th August and *Re Alfred Burchett*, 6th December 1888, before In a case where on the body of the affidavit filed by the s their names were given in full, but one of them, Dudley Hayes, signed the affidavit Dudley Hayes, Molesworth, J., the motion for probate: *Re Hayes* (*h*). I observe that the ioners before whom the affidavits of the executors respec- nd of Mr. William Edward Morris, were sworn, have d the will in each case as "the exhibit referred to in the affidavit." The will, which including the outside sheets of nine sheets of paper, bears no mark, as far as I can ver having been annexed to any affidavit. Two letters were nded up to me, which are referred to in the affidavit of rris as letters "hereunto annexed," and they are described commissioner before whom his affidavit was sworn as ts referred to in the annexed affidavit." The exhibits were

(*f*) 1 V.L.R. (I.) 92. (*g*) 14 V.L.R. 693. (*h*) 6 A.L.T. 64.

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fastened together with a pin, but the affidavit itself bears no mark of having been annexed to any document. I think the practice of thus describing exhibits which are not annexed is irregular and may be confusing. Upon the materials now before me I must refuse the application for probate.

Weigall—With regard to the addresses of the witnesses, does your Honor decide that it is not sufficient if it is sworn that the residence of a clerk is the same place as that of his master?

HOLROYD, J. Yes; I mean to decide that it should be his own residence, not his master's.

Goldsmith as *amicus curiae*—In bills of sale cases it has been held to be sufficient to state the residence of a clerk as that of his master.

HOLROYD, J. I held precisely the same in *Re Fisher* (i), where that was pointed out.

Solicitor: *Michie.*

A. J. A.

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IN RE EDWARD SPENCER, DECEASED.
IN RE ROBERT LAWSON.

Petition under "Statute of Trusts 1864" (*No.* 234)—*Order LII., r.* 16—*On whom intended to serve petition—Amending petition after order made—Lunatic trustee—Petition to appoint new trustee—Service on lunatic.*

The Court has power to amend a petition after an order thereon has been made, and will, after an order has been made on a petition, but before the order has been passed and entered, add a note to the petition under Order LII., r. 16, in these words:—"It is not intended to serve any person with a copy of this petition;" or, 'it is intended to serve so and so with a copy of this petition."

Upon a petition for the appointment of a new trustee, in place of a trustee who has become lunatic, it is not necessary to serve the lunatic trustee.

IN RE EDWARD SPENCER, DECEASED.

MOTION to amend a petition under the "*Statute of Trusts* 1864" (No. 234), after an order thereon had been made.

A petition in the matter of Edward Spencer, deceased, and the "*Statute of Trusts* 1864," was filed by Ellen Frances Kay, on

(i) 14 V.L.R. 693.

16th March 1892, and on the 24th March 1892 the Court made an order for payment out to the petitioner, who was now of age, of certain money belonging to the deceased's estate, which had been paid into the Savings Bank under the provisions of the Statute on the 29th June 1888 by the administratrix of the estate.

The petition had no statement at the foot stating on whom it was intended to be served, or that it was not intended to be served on anyone, and the Chief Clerk refused to pass the order, inasmuch as Order LII., r. 16, required such a statement to be made.

Pennefather now moved for leave to amend the petition by adding to it these words—"It is not intended to serve any person with a copy of this petition." The term "pleading" by sec. 8 of the *Judicature Act* includes a petition, and there is power to amend a pleading at any time. There is also general power given by Order XXVIII., r. 12, at any time to amend any defect or error in any proceeding. The Court may make such amendment, notwithstanding that the order has been already made: *Daniell's Ch. Pr.* (6th ed.), 1570; *Re Bunnett's Settlement* (*a*); *Hyslop* v. *Wykeham* (*b*).

HOLROYD, J. I think I may make the order.

Order made as asked.

Solicitors: *Duffett, Brown & McCulloch.*

A. J. A.

IN RE ROBERT LAWSON.

A PETITION was presented for the appointment of a new trustee in the place of a trustee who had become lunatic, and was then in an asylum. An order for the appointment of a new trustee was made, but the Chief Clerk refused to draw up the order on two grounds; first, that there was no note at the foot of the petition that it was intended to serve anyone; and secondly, that the affidavit of service on the lunatic was not sufficient, but that it ought to have been effected by serving the superintendent of the asylum in which he was confined.

(*a*) 1 Jur. (N.S.) 921. (*b*) 3 W.R. 286.

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Weigall now moved for leave to amend the petition by addi note that it was intended to serve one Murphy, who had bee fact served, with the petition in accordance with Order LII., r. Whether the service on the lunatic was sufficient or not immaterial to inquire, because it was not necessary that he sh be served at all: *Re East* (*a*); *Re Green* (*b*).

HOLROYD, J. That case of *Re Green* seems to me in p Service on the lunatic is a work of supererogation. You may to the Chief Clerk that leave was granted by the Court to am the petition by adding a note that it was intended to serve Murphy, and that it appears from the authorities produced to that it was a work of supererogation to serve the lunatic at all.

Solicitors: *Pentland, Roberts & Thompson.*

A. J.

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WHITNEY *v.* JUSTICES OF FOOTSCRAY.

"*The Explosives Act* 1885" (*No.* 853), *s.* 7—*Explosives Act* 1890 (*No.* 10 "*The Ammunition Factory Act* 1889" (*No.* 1022)—*General Act incon with special Act—License to manufacture ammunition.*

"*The Explosives Act* 1885" prohibited the manufacture of ammunition, carrying on of the process of such manufacture, except at a factory licensed u regulation, and a regulation was passed making the assent of the municipal c of a factory on a proposed site a condition precedent of the power of the Mini grant a license for a factory on such site. By a Crown lease dated May 1 company became empowered to erect a factory and to carry on the process manufacture of ammunition upon the land contained in the lease, subject to covenants. This lease was ratified by an Act of Parliament, No. 1022. The co commenced its business without obtaining the assent of the municipality, and w obtaining a license under the existing *Explosives Act* 1890. The compan prosecuted for carrying on business without such license.

Held, that inasmuch as a general Act is controlled by a special Act relat the same subject-matter, the provisions of the general Act must yield to th visions of the special Act where they are inconsistent, and that the compan entitled to carry on its business subject to the provisions of the special Act.

SPECIAL CASE.

This was a special case stated for the consideration of the Court by His Honor Judge Hamilton, as Chairman of the Cou General Sessions, at Melbourne.

(*a*) L.R. 8 Ch. 735. (*b*) L.R. 10 Ch. 272.

The special case was as follows:—"The appellant is the manager of the Colonial Ammunition Factory Company Limited, which carries on business at Footscray. The said company became the lessee of the land, on which its factory is situated, by an indenture dated 28th May 1889. A copy of this indenture is annexed to this case. This indenture was ratified by "*The Ammunition Factory Act* 1889" (No. 1022). On the 15th June 1891 the court of petty sessions, at Footscray, convicted the appellant for manufacturing ammunition on the premises of the company on the 7th April 1891, which premises were not then licensed under the *Explosives Act* 1890, and the court adjudged him to pay a fine of 5*l.* 5*s.*, with costs. The appellant did manufacture ammunition on the premises of the said company, and the said premises were not then licensed under the *Explosives Act* as stated in the conviction. Regulations under the *Explosives Act* 1890 were duly made and were gazetted upon the 17th January 1891. The case came on for hearing before me on the 14th July 1891, and I quashed the conviction, whereupon the respondent, Cecil Napier Hake, asked me to state this case for the determination of the Supreme Court. The question for the determination of the Court is whether the appellant was rightly convicted."

The Colonial Ammunition Factory Company Limited, of which the appellant was the manager, obtained a lease of land from the Crown in May 1889 for the purpose of erecting a factory thereon for the manufacture of ammunition. The lessees bound themselves to supply the Government with a large number of cartridges upon specified terms, and were also at liberty to manufacture ammunition for sale generally. The lease also contained covenants with respect to the mode of carrying on the business, and to the user of the land. "*The Ammunition Factory Act* 1889" (No. 1022) was passed in November 1889, ratifying the lease, and the company thereupon commenced business. Subsequently the *Explosives Act* 1890 was passed, and under the provisions of that Act the inspector appointed thereunder contended that the business of the company could not be carried on unless and until it had been licensed under the provisions of the *Explosives Act* 1890. "*The Explosives Act* 1885," which was in force at the time the lease was granted, and at the time of the passing of Act No. 1022, prohibited

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the manufacture of ammunition except at a factory licensed under a regulation.

Smyth for the respondent.

Madden (*Bryant* with him) for the appellant Whitney.

Cur. adv. vult.

HIGINBOTHAM, C.J. Case stated for the determination of the Full Court by the Chairman of the Court of General Sessions, at Melbourne, under sec. 139 of the *Justices Act* 1890. The appellant, A. Whitney, was convicted, on 10th June 1891, by the court of petty sessions, at Footscray, on a charge of manufacturing ammunition, on 7th April 1891, on the premises of the Colonial Ammunition Factory Company, of which he was the manager, such premises not being then licensed under the *Explosives Act* 1890, and he was fined 5*l.* 5*s.*, with 21*l.* costs. The Court of General Sessions, on appeal, quashed the conviction, and we have now to determine whether the appellant was rightly convicted.

"*The Explosives Act* 1885" was passed to protect the public against the dangers arising in the hazardous operations of the manufacture, carriage, storage, and sale of all kinds of explosives. Sec. 7 prohibited, under heavy penalties, the manufacture of any explosive, a term which includes ammunition of all descriptions, except at a factory licensed for the same under any regulation made under the Act. By sec. 5 (1) power was given to the Governor in Council from time to time to make, alter, and repeal regulations for the purpose, *inter alia*, of licensing factories for the manufacture of explosives. Regulations made under this power, and in force at the time of the alleged offence, imposed strict conditions on the issue of a license by the Minister of the Crown administering the Act. It was provided by those regulations, amongst other things, that the Minister might reject the application for a license altogether, or might grant to the applicant permission to apply to the municipal council for their assent to the establishment of a factory on a proposed site, and that such assent should be first obtained, and forwarded to the Minister in writing, before the application for a license should be finally dealt with; and further, that on the preliminary approval of an application for a license the applicant should

the factory and the arrangements thereof in accordance erms of the proposed license, and to the satisfaction of a nt inspector, before the license should be issued. Minute ent provisions are made by the Act and the regulations servance by the licensee of the conditions of the license, e management of the factory in accordance with specific les to secure public safety and convenience in the process acture. Part V. of the Act provides for inspection by nt inspectors of magazines and factories.

provisions of the Act of Parliament must be taken to known to the Government at the time (28th May 1889) lease about to be mentioned was granted by the Governor in and to Parliament at the time (4th November 1889) when was ratified by Act No. 1022. It has been assumed in the that the regulations which were put in evidence, though later date, were substantially the same as the regula- orce at the same periods.

e 28th May 1889 a lease of Crown lands, comprising five hereabouts, together with certain easements, was granted rown to the Colonial Ammunition Company Limited, a duly registered in England, under the Companies 2-83, for a term of 999 years, at a peppercorn rent. The ound themselves to supply ammunition cartridges to the ent on certain terms; they were not prevented from uring and selling ammunition to other purchasers. The tained covenants by the lessees that they would carry on ry under regulations framed by the lessees, or their s, to be approved by the Minister of Defence; that he lessees nor their successors would use the demised or the easements enjoyed therewith under the lease ther use or purpose than an ammunition factory; that ld at all times permit and allow all persons authorised Majesty or Her successors, or by the Minister of Defence, s to all and every part of the premises thereby demised, urpose of inspection or for any other purpose whatsoever; they would not sublet or assign the demised premises, or thereof, without the permission in writing of the Minister ce. The lease was granted upon the express condition that

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Her Majesty and Her successors, or the Board of Land and Works, its successors or assigns, might re-enter and re-possess the premises for rent in arrear, or upon breach of any of the covenants, whether negative or positive, therein contained by or on the part of the lessees. Lastly, it was expressly agreed that the lease was granted by Her Majesty and accepted by the lessees, and that the several covenants and provisions therein before contained on the part of Her Majesty, or Her Majesty's Government in Victoria, and on the part of the lessees, were entered into, subject wholly to ratification by the Parliament of Victoria, and that in the event of the Parliament of Victoria not ratifying the granting of the lease within twelve months from the date thereof the lease should be absolutely void and of no effect.

The Act No. 1022 was passed in the same year on 4th November. The preamble recited that it was desirable and expedient that the lease should be ratified by Parliament. Sec. 2 provided that notwithstanding anything contained in any Act relating to lands of the Crown the lease granted by the Governor in Council to the Colonial Ammunition Company Limited, and bearing date the 28th day of May 1889, together with all the rights, powers, privileges, and easements thereby created and conferred, was thereby ratified and confirmed, and that it should be lawful for the Governor in Council to carry out and give effect to the same. The first words of this section suggest that doubts were entertained whether, without an Act of Parliament, a lease of Crown lands, for such a purpose and on such terms, could be granted by the Governor in Council under the existing *Land Act*. No reference is made to "*The Explosives Act* 1885," or to any other Act, general or special.

The appellant relies on the rule of interpretation of Statutes, that a general Act is controlled by a special Act, and that the provisions of a general Act must yield to those of a special Act in so far as they are inconsistent with them: *Attorney-General* v. *Great Eastern Railway Company* (*a*); confirmed on appeal in L.R. 6 E. & I. App. 367; *Corporation of Yarmouth* v. *Simmons* (*b*). It has been argued, and in our opinion the argument has not been answered, that such an inconsistency arises between "*The*

(*a*) 7 Ch. App. 475. (*b*) 10 Ch. D. 518.

s Act 1885" and Act No. 1022 with reference to the subject-
the conviction in this case. "*The Explosives Act* 1885"
the manufacture of ammunition, or the carrying on of
s of such manufacture, except at a factory licensed under
on: Sec. 7. Regulation 24 made the assent of the muni-
cil to a factory on the proposed site a condition precedent
ver of the Minister to grant a license for a factory on such
e Act No. 1022, ratifying the lease, gave legislative
to the lessees to erect a factory and to carry on the
the manufacture of ammunition upon the land contained
ase. A lease, when thus ratified, must be regarded we
a parliamentary license to the lessees to carry on this
business exempt from the necessity of obtaining for the
e the assent of the municipal council or a license from the
It has been contended that it could not have been the
of the Legislature to deprive the inhabitants of this locality
mple protection provided for them by "*The Explosives*
," and to substitute for that Act, and the regulations under
provisions for management, inspection, and control as are
in this lease. But we cannot speculate upon what the
of the Legislature may have been; we must only construe
age that is used, and the Legislature has, in our opinion,
d the erection and carrying on of this factory free from
s of control created by the earlier and general Act.
ave arrived at the determination, but not without some
, that the appellant was not rightly convicted, and that
ction was properly quashed.

IAMS, J. I agree with the judgment of the Court, and in
ns stated for the judgment, but I desire to state that I was
e argument, and have since remained, free from the doubts
fected, and still seem to affect, the other members of the
The view I took during the argument was that this manu-
outside the *Explosives Act* altogether, and I still adhere
iew. Nor am I so much pressed by the consideration that
ng this manufactory outside the *Explosives Act* renders it
source of peril to the locality in which it is situate than
ave been the case had it been under the operation of that

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Act. There is a covenant in the lease (which Parliamen ratified and of which it has expressed approval) providing th lessees will carry on their business under regulations pass them, but approved by the Minister of Defence. If the l commit a breach of this covenant (which fact may be ascer by inspection under another covenant in the lease) Her Maje the Board of Land and Works, may determine the lease by re- It is not to be assumed that the Crown (the lessor) or the Mi of Defence has so neglected its or his duty as to allow this sarily dangerous business to be carried on either not under r tions, or under regulations which are not reasonably adequat sufficient to protect life, limb, and property. Assuming, as bound to do, that this pressing and momentous duty has no neglected, I fail to see why, under such regulations, the busi this factory should not be carried on with no greater peril would have been the case had it been amenable to the provisi the Act mentioned.

HOOD, J. I concur in the judgment of the Court.

Solicitors for appellant: *Gillott, Croker & Snowden.*
Solicitor for respondents: *Guinness*, Crown Solicitor.

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March 13.

SHERSON *v.* AGNEW.

Auction Sales Act **1890 (*No.* 1065), *ss.* 3, 21—*Order to review conviction fo by auction after sunset—Sale by auction.***

The defendant stood on a form in a hall and sold after sunset certain goo describing them and offering to sell them for a certain price, which he named

Held, that the defendant was conducting a sale by way of auction wit meaning of the second description of the definition of "sales by auction" in the *Auction Sales Act* 1890, as selling in a mode "whereby the first pers claims the goods or articles submitted for sale at a certain price named by the acting as auctioneer is the purchaser," and that, therefore, defendant could victed for selling by auction after sunset under sec. 21 of the Act.

ORDER to review.

James Sherson, a sergeant of police at Maryborough, l information against Robert Agnew, under sec. 21 of the *A*

Sales Act 1890 (No. 1065), for selling goods after sunset, and the magistrates convicted the defendant, and fined him 5*l.* 5*s*. The defendant obtained an order *nisi* to review it on three grounds, viz.:—That there was no evidence that the defendant was a licensed auctioneer; that there was no evidence that the defendant was acting as an auctioneer or selling by auction; and that evidence was improperly admitted at the hearing. The first ground was withdrawn, and the point mainly argued was what constituted selling by auction. The facts sufficiently appear from the judgment.

Box to show cause—The case comes within the second part of the definition of sales by auction in sec. 3 of the Act. The order of the justices was right.

Cussen to move the order absolute—To bring the defendant within the terms of the definition in sec. 3 it must be shown that he was a "person acting as auctioneer." By the Act, in the same section, "auctioneer" is defined as a "person who shall sell . . . . any goods . . . by way of auction as herein defined." It must be shown that the defendant was selling by way of auction.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. This was an information laid against the defendant under sec. 21 of the *Auction Sales Act* 1890, for selling by auction goods and chattels after sunset. The magistrates convicted the defendant, and this order to review was obtained on three grounds. The first has very properly, under the circumstances, been withdrawn. The second ground was that there was no evidence that the defendant was acting as an auctioneer or selling by auction on the occasion and at the time and place referred to in the information. Now, the evidence of what occurred on this occasion was shortly this: The time was between 7 and 8 o'clock on the 18th of July, after sunset, and the defendant, who was the owner and manager of the hall in which these goods were disposed of, is described as acting in this way:—

"Defendant was standing on a form in front of the goods. The hall was pretty well full of people. I did not see any other person selling in the same way as Agnew. Agnew was walking on the form, and took a knife out of a pigeon-hole, which he

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fully described, and stated it could not be bought for less than 1s. 6d. or 2s., a would sell it for 1s. Some person handed up a shilling, and received the Before selling the knife, he opened all the blades, and pointed out a corkscrew in it. After selling this knife he took out a similar one, and offered it for sal no purchaser came up, he put it back. He then got two screw-drivers, and them up and offered them for sale in a similar manner, and stated he would 1s. 6d. for the two. He sold one lot of these screw-drivers. He sold all the s mentioned in the information in a similar manner."

It is contended under this second ground that there is no dence that the defendant was acting as an auctioneer or sellin auction, and this raises the question as to what is the p construction of sec. 3 of the *Auction Sales Act* 1890. The definition in the section defines the word "auctioneer" to and apply to

"Any person who shall sell or attempt to sell or offer for sale or resale any etc. . . . . by way of auction as herein defined."

Then the third definition in the section defines "sale auction," and gives three cases of sales by auction—first, the in which goods or lands, or any interest in either of them is s

"By outcry, knocking down of hammer, candle, lot, parcel, instrument, m or any other mode whereby the highest or the lowest bidder is the purchaser."

That description applies to the case of an ordinary sa auction, which means ordinarily an increasing or enhancing price of the goods sold by bidding. That is the most co sense in which the word is used. It also includes what is k as a Dutch auction, which is described as putting up proper sale at a price above its value, and gradually lowering the until some person bids. The facts of this case do not br within either of the above cases. The second kind of "sal auction" is then referred to in this section, which proceeds—

"Or whereby the first person who claims the goods or articles submitted at a certain price named by the person acting as auctioneer is the purchaser."

It appears to us that this second description is introduced to the very case before us. It is intended to prevent a person of goods for sale in the way here described, a way not ordinarily at public sales, but tendering for sale a particular article, desc its merits, and offering that particular article to any perso will pay a particular price for it, and then proceeding to offer s articles to other persons willing to pay the same price.

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ingeniously by Mr. Cussen that the words "acting as er" take this case out of the present facts, because it was n that the defendant was acting as an auctioneer in selling icles, and in support of that view he describes an auctioneer son who at the sale sells by way of auction, and contends erson is not acting as an auctioneer unless he is so doing. k that that contention is met by the suggestion that acting ctioneer under the second head of this definition really is y way of auction; he is the person who has effected the it is not necessary that he should sell by way of increment ntion of price to bring him within this particular description. endant here was the person who was effecting the sale of icles to persons who claimed the goods submitted for sale ain price, therefore he was acting as an auctioneer, because elling to those persons by way of auction as described under nd head of this definition.

third ground of the order was that certain evidence was rly admitted at the hearing. The evidence referred vidence that there was a notice posted up outside the stating that Bruce auctions were conducted every evening from 7 to 10 o'clock. It was posted on a ce adjoining the building. There is also evidence that one who attended the hall on that evening had his attention to this notice during the earlier part of the day, and that ed the hall in consequence of seeing the notice. There is dence that the sergeant of police communicated with the t on the evening of the same day as to the manner in e was conducting his business; but the defendant claimed a perfect right to sell, and stated that he had had legal n the subject, and had conducted similar sales in other the colony. The evidence also shows that this sale was n Saturday evening between the hours mentioned on card. Now, we think that that evidence is not uncon- with the defendant, and that it was properly admitted justices. We do not lay down any general rule as ther the improper admission or rejection of evidence cases of orders to review is a valid ground of objec- That admission or rejection of evidence in such cases

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involves many considerations, and it would be difficult to lay down any general rule. The case of *Rattray* v. *Roach* (*a*) referred to in argument is not a case similar to this. It was decided on a different principle. We think that there was evidence to connect the defendant with this particular placard. We therefore think that on this ground also the order to review has failed. The order to review will be dismissed with costs.

Solicitor for plaintiff: *Guinness*, Crown Soiicitor.
Solicitors for defendant: *Gaunson & Wallace.*

A. F. M.

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March 25.
May 2.
Holroyd, J.

CHRISTIE *v.* FOSTER BREWING CO. LIMITED.

Trade Marks Act 1890 (*No.* 1146), *s.* 13, *sub-sec.* 2—*Liability of a corporation to be guilty of offence under this section—False trade description applied to goods—Meaning of goods for sale.*

Sec. 13 of the *Trade Marks Act* 1890 applies to a corporation, and it may be found guilty of the offence of unlawfully having in its possession, for sale, goods to which a false trade description is applied.

Defendants manufactured certain beer to a customer's order and bottled it, affixing to the bottles labels purchased by them from the customer. The bottles were neither packed in cases nor paid for.

Held, that the defendants did not thus irrevocably appropriate the beer, and that, as it was neither delivered to the customer nor approved of by him, the beer had not been already sold, and therefore was goods in the possession of the defendants for sale within the meaning of sub-sec. 2 of sec. 13 of the *Trade Marks Act* 1890.

Beer manufactured in Collingwood, in Victoria, was exposed for sale in bottles bearing a label inscribed in German, of which the meaning in English was "Export Brewery Company, Munich Beer, best quality." The label also bore the device of a cross with the German words meaning "trade mark" written beneath it, and "specially brewed for a hot climate."

Held, that this inscription was a false trade description within the meaning of sub-sec. 2, sec. 13, of the *Trade Marks Act* 1890.

A direction to prosecute is sufficient, although it may not exactly correspond with the information, if the direction comprises the offence set out in the information.

ORDER *nisi* to review.

Prior to the arguments, affidavits were filed by the justices stating that the grounds of their decision were that sec. 13 of the

(*a*) 16 V.L.R. 165.

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Marks Act 1890 did not apply to a corporation, that the re not in the possession of the defendants for sale, and that dants acted innocently.

s for the defendants to show cause—The evidence shows goods seized, although in the defendants' possession, were ir possession for sale. They had already been sold. Sec. 13 *Trade Marks Act* 1890 applies to a person and not to a on. The proviso in sub-sec. 6 of that section gives an the defendants which can be exercised only by a person. how can a corporation answer the questions directed to be an accused person by sec. 43 of the *Justices Act* 1890? f the *Trade Marks Act* 1890 defines the word "persons," interpretation must be taken reasonably and so as not to e object of the Statute: *Re The Fourth South Melbourne Society* (*a*). The defendants acted innocently. They fixed labels supplied to them by Lange & Thonemann to belonging to Lange & Thonemann. The authority to is bad, as it does not correspond exactly with the on.

. *Smyth* for the plaintiff informant to move the order —Sec. 13 of the *Trade Marks Act* 1890 applies to ons: *Starey* v. *Chilworth Gunpowder Co.* (*b*); *Reg.* v. *exparte Farmers' Produce Co.* (*c*). The onus of proof lies defendants to show that they acted innocently. The given was to do all acts necessary for the prosecution, and e sufficient.

Cur. adv. vult.

LOYD, J. This was an order *nisi* to review an order of the petty sessions at Melbourne, dismissing an information Christie against the defendant company for having on the January 1892 unlawfully had in its possession for sale en bottles of beer to which a false trade description was

(*a*) L.R. (Eq.) 54. (*b*) 24 Q.B.D. 90. (*c*) 14 V.L.R. 836.

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It appears from the affidavits of three of the four justices who heard the information that they dismissed it on three grounds, firstly, that the section of the *Trade Marks Act* 1890, under which the information was laid, did not apply to a company; secondly, that the goods in question were not in the possession of the defendant for sale; and thirdly, that the defendant acted innocently. In *Reg.* v. *Panton, exparte Farmers' Produce Co. Limited* (*d*) it was held by the Full Court that an incorporated company was liable to prosecution under the 59th section of "*The Public Health Amendment Act* 1883" for knowingly having in its possession for the purpose of sale unwholesome meat; my brother Williams doubting whether guilty knowledge could be imputed to a corporation. That decision is for the present at least binding, and from the tendency of recent legislation is I think not likely to be disturbed. We have in our *Interpretation Act* a clause which directs that in all Statutes the word "person" shall include corporation unless there is something in the subject or context repugnant to that construction. By sec. 12 of the *Trade Marks Act* 1890, copied from sec. 3 of the English Statute, 50 & 51 Vict., c. 28, the words "persons," "manufacturer dealer or trader" and "proprietor" are expressly declared to include for the purpose of Part II. of that Act, which deals specially with offences created in relation to trade marks and trade descriptions, any body of persons corporate or unincorporate. The declaration is absolute. There is no exception even of the case in which the subject or context may appear repugnant to such a construction. In the English Statute "person" is defined, and not "persons," and the word "persons" in sec. 12 is almost certainly a misprint. It cannot reasonably be suggested that by the definition of "persons" in the plural it might have been intended to limit the meaning of "person" in the singular, because, while "person" occurs repeatedly in Part II., "persons" will be found in only two other places where any definition of the word could not possibly be required. Adopting the common rule of interpretation, also embodied in our *Interpretation Act*, that the plural number includes the singular, there has been introduced into Part II. of this particular Statute, not merely a repetition of the

(*d*) 14 V.L.R. 836.

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general enactment concerning the meaning of "person" or "persons" as ordinarily embracing corporations, but an enlargement of it unqualified by any reference to context or subject. Lord Selborne on one occasion in the House of Lords observed that Statutes, like other documents, are constantly conceived according to the popular use of language, and that in its popular sense "person" did not extend to a person in law. "That accounts," he went on to say, "for the frequent occurrence in some Statutes in interpretation clauses of an express declaration that the word person shall extend to a body politic or corporate." At that time there did not, and as far as I am aware does not now, exist in England a general enactment like our own interpreting the word in the same way in all Statutes unless restricted by the subject or context. His Lordship's language shows clearly the importance to be attached to such a declaration, whether applied to all Statutes or to any Statute in particular. How much greater weight, then, should be attributed to the declaration when the restrictive qualification is withdrawn? The object of the 59th and other sections of "*The Public Health Amendment Act* 1883" was to prevent the consumption of unwholesome meat, and I thought that the acts, which with that object had been prohibited and made offences under the law, such as selling unwholesome meat or exposing it or knowingly having it in possession for sale, were all of one class, and could be as easily committed by an incorporated company as by an individual; and, when committed by either, needed equally to be visited with punishment that others might be deterred from the same offences. A corporation cannot act, any more than it can think, unless by its servants, and in all civil proceedings the acts of the servants entrusted with the management of its affairs and acting within the scope of their authority must, and in some criminal or quasi-criminal proceedings certainly may, be deemed the acts of the corporation, and their knowledge its knowledge. A proceeding against a corporation for having knowingly in its possession for sale meat not fit to be sold was in my opinion one of those proceedings. I think the same of a proceeding against this incorporated brewing company for unlawfully having in its possession for sale goods to which a false trade description was applied. There is no difference in principle between the two cases.

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The only distinction is one as to proof. The person found with falsely described goods in his possession may excuse himself in various ways, and amongst others by proving that he acted innocently. The offence itself belongs to a class created by Statute with the view of preventing goods from being palmed off as something which they are not.

The offence of which the company was accused is punishable either by imprisonment with or without hard labour or by a fine. Every person charged with such an offence before a Court of Petty Sessions has the option, if he chooses to exercise it, of being tried on indictment or presentment, and on appearing before the Court is to be informed of his right to be so tried, and if he then exercises his option, the justices are to deal with the charge as with others which may be prosecuted by indictment or presentment. It was put to me by counsel that a corporation could neither be imprisoned, nor exercise the option given to the accused, which was personal; and moreover that it could not answer the questions which the 43rd section of the *Justices Act* 1890 directs to be asked of the accused. These would be very weighty arguments, if the Legislature had not indicated, otherwise than by penalty and the mode of prosecution, by whom the offence may be committed. But once satisfy yourself from other sources that Parliament has within its purview as offenders corporations as well as individuals, and the difficulty vanishes. Assume that corporations can offend, will any practical inconvenience have to be surmounted in the trial of such offenders, or in sentencing them if convicted; or will they be subjected to any injustice? As was pointed out in the case to which I have referred, corporations can undoubtedly be indicted and fined; and as to answering questions, if they can know think and act by their servants, why should they not speak by them also? But in truth under the 43rd section of the *Justices Act*, and also under the 39th, the same question would arise as has arisen here as to the meaning of "person." They both commence "if any person, etc." But to determine the meaning in those sections only the aid of the *Interpretation Act* could be invoked. If they were plainly inapplicable to a corporation, then in those sections the word "person" would not include a corporation, because there would

thing in the subject or context repugnant to such a con-
n.

the next place the magistrates were of opinion that the
und in the company's possession were not for sale, but had
ready sold to Lange & Thoneman. Mr. Talbot, the
y of the company, who was managing its business at the
the seizure, has explained what the course of dealing was
the company and Lange & Thoneman. The beer which
& Thoneman had been in the habit of purchasing since
last was specially brewed by the company to their order.
els were prepared by Lange & Thoneman and supplied by
the company, and the company paid for as many as they
The beer was bottled by the company, and the company's
affixed the labels to the bottles and packed the bottles in
hich the company had had made, and stencilled upon the
e letters Lange & Thoneman over M in a diamond, and also
rds "Export Brauhaus Compagnie, Münchener Bier."
es so marked were delivered to Lange & Thoneman, who
l price for them, and the company paid Lange & Thoneman
labels. In fact Lange & Thoneman bought the beer
and cases, and the company bought the labels. No charge
de for stencilling. The bottles of beer which were
were still in the brewery. They had been ordered by
& Thoneman and had the labels attached to them, but had
n packed in their cases nor paid for. It did not appear
the order for the goods was in writing nor what were its
out in the argument the validity of the contract of sale was
assumed. Whether there had been a binding contract or
property in the goods had not passed to Lange & Thoneman
time of the seizure. When a man contracts to sell to
an article which he has to manufacture, the vendor must
iate the article when made, and the purchaser must assent
ppropriation, before the property can pass to him. In my
the company had not by affixing the labels irrevocably
iated the goods. If they had sold them to others,
& Thoneman could not have claimed them as theirs; and
n of this lot they had supplied Lange & Thoneman with
imilar beer similarly bottled and labelled, they could not

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have been successfully sued for breach of contract. Even if there had been an appropriation on the part of the company, Lange & Thoneman had not assented to it. Then the pinch of the case is this, whether, when goods have been manufactured to a customer's order, but neither delivered nor approved, so that the property in the goods has not passed, the goods are for sale within the meaning of sub-sec. 2 of sec. 18 of the *Trade Marks Act*, or whether the expression "for sale" means more than for sale generally, that is, to any person who is ready and willing to pay the price demanded. The expression is not necessarily so limited, and in my opinion is not so limited in the definition of the offence with which the company is charged. Strictly speaking the falsely described beer was for sale. It was neither made nor bottled nor kept for any other purpose; although intended to be sold to known persons, if they would accept it as according to order. The mischief is the same, whether the manufacturer applies a false description to goods at the instance of a promised customer to assist him in deceiving others; or whether he applies it while awaiting customers with the intent to deceive the first who may present himself. When there is a choice of interpretations it is the duty of the judge to adopt that one which will diminish the mischief by enlarging the remedy. *Boni judicis est ampliare jurisdictionem.*

In the third place, the justices were of opinion that the defendant had acted innocently. But, as appears from an affidavit filed on behalf of the company, the justices had selected a wrong standpoint. They were regarding the company, not as a body corporate acting by its servants, but as an aggregate of responsible shareholders, all of them possibly, and most of them probably, innocent individually. I can discover no trace of innocence in the corporation. The label affixed to the bottles exhibited in conspicuous letters the inscription, "Export Brauhaus Compagnie, Münchener Bier. Beste Qualität," signifying in English "Export Brewery Company, Munich Beer. Best Quality." It also bore a cross with "Handels-Zeichen," that is, "Trade Mark," written beneath it, and the words "Speciell für heisse klimate gebraut," that is, "Specially brewed for hot climates." What would anyone who had learnt German, or had

the inscription translated to him, understand the label to import, but that the beer had been brewed in Munich by a foreign company for exportation to a hot climate? Could anybody conceive from the general appearance of the label that the beer had been brewed in Victoria? Not only was the description false as to the country and place in which the goods were manufactured, but no one, who knew where they came from, could reasonably have imagined that it would not deceive, or that it had not been invented for that very purpose. Mr. Talbot, the then manager, must have been aware that Lange & Thoneman had ordered the beer to sell it again. Itlay upon the corporation to prove its innocence, and no proof of innocence has been produced. The evidence, into which I need not further enter, all tends to the opposite conclusion.

The proceedings before the court of petty sessions were instituted by the written direction of the Commissioner of Trade and Customs. Mr. Isaacs attacked the direction as insufficient, because it did not correspond with the information. The direction authorised Christie to prosecute the company for one of the offences enumerated in the 18th section of the *Trade Marks Act*, namely, unlawfully having in its possession for sale goods to which a false trade description was applied. It specified the goods as "cases containing bottles of beer," and the description as consisting of figures words and marks which were reasonably calculated to lead persons to believe that the beer was the manufacture of some person other than the person whose manufacture it really was, and as being false in a material respect as to the place or country in which the beer was made or produced; whereas the information specified the goods as "bottles of beer" only, and the description as labels to indicate that the beer was made or produced in Germany, and false in a material respect as to the place or country in which the beer was made or produced. If the information had been laid in the exact terms of the authority the evidence would have justified a conviction; but the information as laid was sufficient to sustain a conviction if proved. The specification in the authority was more ample than that in the information, but comprised it. The authority instead of being insufficient was more than sufficient. A prisoner may be found guilty of larceny under

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a presentment which charges him with stealing six sheets and five blankets although he stole only three sheets.

The order to review will be absolute with costs. The order dismissing the information must be set aside, and the case must be remitted to the justices for rehearing with an intimation of the opinion of the Court that the section of the *Trade Marks Act* 1890, under which the information was laid, did apply to an incorporated company; that in law the goods in question were in the possession of the defendant for sale; and that there was no proof that the defendant had acted innocently; and further, that Christie's authority to institute the prosecution was sufficient. The costs of the first hearing must abide the result of the rehearing.

Solicitor for plaintiff: *Guinness*, Crown Solicitor.
Solicitors for defendants: *Pavey, Wilson & Cohen.*

A. F. M.

1892
March 25.
May 2.

Holroyd, J.

[IN CHAMBERS.]

FEDERAL BANK OF AUSTRALIA *v.* BYRNE.

Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6—*Order XIV., r.* 1—*Specially endorsed writ—Banker's account—Particulars—Claim for interest.*

When an action is brought by a banker to recover the amount of an overdrawn account with interest, the particulars should set out the time at which the account commenced, the rate at which interest was charged, and the manner in which it was calculated, whether on daily balances or otherwise, and whether with half-yearly or other rests.

In such a case, where a claim is made for interest from the date of the writ till judgment, the particulars should show whether the interest is demanded by way of damages or pursuant to the contract stated in the endorsement.

A writ not complying with the above requirements cannot be held to be specially endorsed.

APPLICATION on behalf of the plaintiffs under Order XIV., r. 1, for leave to sign final judgment.

The writ was endorsed as follows:—

"The plaintiffs' claim is for money payable by the defendant to the plaintiffs, and for money lent by the plaintiffs as bankers to the defendant, and for money paid by the plaintiffs for the defendant at his request and to his use, and for interest upon money due from the defendant to the plaintiffs and forborne at interest by the

plaintiffs to the defendant at his request, and for money found to be due from the the defendant to the plaintiffs on accounts stated between them. The plaintiffs claim 21,870*l.* 13*s.* 6*d.*

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Feb. 29.	Principal due upon the defendant's overdrawn banking account with the plaintiffs ...	21,265*l.*	3*s.*	9*d.*
	Interest on same	605*l.*	9*s.*	9*d.*
	Amount due	21,870*l.*	13*s.*	6*d.*

And the plaintiffs claim interest on 21,265*l.* 3*s.* 9*d.* of the above sum at the rate of 8*l.* per centum per annum from the date hereof to the day of signing judgment.

Cook to oppose—This is not a good specially endorsed writ. No dates are specified on which the money was lent. No dates are given from which the interest is claimed, nor is the rate at which interest was charged stated, nor is the date given at which the accounts between the parties were stated. It should have been stated whether the interest was claimed under a contract or by way of damages. He cited *Coane* v. *Thomas Bent Land Co.* (*a*); *Walker* v. *Hicks* (*b*); *Parpaite* v. *Dickinson* (*c*); *Perry* v. *Flint* (*d*); *Windsor Coffee Palace* v. *Cheel* (*e*).

Higgins in support—The defendant should know what is claimed from his own bank book. The defendant cannot expect bankers to set out every item in his account with the bank during the whole period of his dealing with it. He cited *Aston* v. *Hurwitz* (*f*).

Cur. adv. vult.

HOLROYD, J. An application was made to me in this case on behalf of the plaintiffs for liberty to sign final judgment for the amount endorsed on the writ of summons, with interest and costs. The question to be determined was whether the particulars in the endorsement on the writ of summons were sufficient to constitute the writ a specially endorsed writ within the meaning of the rules. The particulars were as follow:—[His Honor read the particulars].

(*a*) 17 V.L.R. 198.
(*b*) 3 Q.B.D. 8.
(*c*) 38 L.T. (N.S.) 178.
(*d*) 9 A.L.T. 99.
(*e*) 10 A.L.T. 275.
(*f*) 41 L.T. (N.S.) 521.

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Beneath the particulars was set out a further claim for interes follows:—[His Honor read the further claim]. The date of writ is the 29th of February 1892. Several English cases cited to me, and if I followed the principle laid down in t cases, namely, that the defendant must be furnished with partic sufficient to enable him to judge whether he ought to pay amount demanded, I think I should be obliged to determine the plaintiffs should have furnished the defendant with the w of his bank account from the beginning to the end; but th appears to me, cannot have been the intention of the rules. however I think should have been done at the least. I think the period at which the account commenced should have been s in the particulars, and also the rate at which interest was cha and the manner in which it was calculated, whether on balances or otherwise, and whether with half-yearly or other I also think it should have been made to appear whether interest in the subjoined claim was demanded by way of dam or pursuant to the contract stated in the endorsement. I therefore hold that the writ is not specially endorsed, and summons must be dismissed with costs.

Solicitors for plaintiffs: *Casey & O'Halloran.*
Solicitor for defendant: *Fergie.*

A. F.

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June 2.

Act 1890 (*No.* 1103), *ss.* 134, 135—*Fifth Schedule—Bill of sale—Notice tion to file bill of sale—Consideration—Particulars to be stated in*

135 of the *Instruments Act* 1890 (No. 1103) it is provided that the notice to file a bill of sale shall be in the form given by the Fifth Schedule to ntaining a statement of the particulars in such form mentioned. The ule contained the heading "Consideration," and under that heading the s, in different columns, "Past advances," "Advances at time of giving " and "Future advances."

ime of giving a bill of sale the grantees had, in addition to the considera- set out in the notice of intention to file the bill of sale, agreed to he grantor to the extent of 1,000*l.* with a bank. The fact of the agree- e such guarantee was recited in the deed, but no mention of it was made culars filed under the form given in the Fifth Schedule.

er HIGINBOTHAM, C.J., and A'BECKETT, J. (HOOD, J., *dissentiente*), that to state the guarantee in the particulars in the notice of intention to file not invalidate the bill of sale.

GINBOTHAM, C.J. The consideration for a bill of sale may consist of wholly, or in part, different from money, and in such a case it is not neces- e consideration should be stated in the notice of intention to file the bill

e of intention to file a bill of sale may be good although some or all of the y have to be left unfilled.

ntee or promise to answer for the debt, default, or miscarriage of another mething distinct from a past or present debt owing by, and a promise to e advances to, that other person.

ECKETT, J. The third column of the Fifth Schedule to the Act No. 1103 contain the debt and advances to be secured, and nothing more, and if orrectly stated the Act is sufficiently complied with, although there may ome other consideration not stated.

OD, J. The effect of the form given in the Fifth Schedule is to require a f both the consideration and the amount secured. Whenever the form can ly followed both should be given, and whenever the consideration consists of the usual items, and also constitutes the sum secured, the form should followed. Where the consideration consists of something else, then the e modified so as to be of the like effect, and must state the nature of the n and what is the amount secured.

AL from judgment of Hodges, J. (reported Vol. XVII.,

was an appeal in an action brought by Frederick Danby and Henry Wooton Danby, the trustees of the estate of Sven Adolf Nilsson Wiedemann against the

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Australian Financial Agency and Guarantee Company Lim to recover 30,000*l.* damages for the detention and conve of part of the insolvent estate claimed by them under a of sale given by the insolvent to the company, whic was alleged was void. The grounds upon which the pla alleged that the bill of sale was void were (1) that the noti intention to file the same did not set out the true considerati the bill of sale; (2) that the bill of sale itself did not truly the consideration; (3) that the bill of sale was made subject t condition that if the stock were reduced below 9,000*l.* Wiede should pay all the money he received therefor to the company this condition was not inserted in the bill of sale.

In the notice of intention to file the bill of sale, unde heading "Consideration," sub-heading "Past debts taken ov grantor at time of giving bill of sale," were the words "Inde ness of G. M. Pickles to the Australian Financial Agency Guarantee Company Limited to the extent of 15,080*l.*, take grantor at time of giving bill of sale"; and under the he "Consideration," sub-heading "Future advances," were the "Yes; if any." It was alleged that the consideration, in the n of intention to file the bill of sale and in the bill of sale inaccurate in these respects—That part of the considerati giving the bill of sale was the company's promise to g guarantee for 1,000*l.* to a bank, and that was not stated; tha part of the 15,080*l.* was not a debt of Pickles at all, but c firm; that the consideration was not for taking over Pickles' of 15,080*l.*, but for 16,580*l.*, and that part of the considerati the release of Pickles from his debt, and that this was not s The learned primary judge gave judgment for the defendants the plaintiffs now appealed from that judgment. The facts of case are fully set out in the judgment of Hodges, J. (*a*).

Higgins and *Mitchell* (with them *Bryant*) for the appella The notice of intention to file the bill of sale does not stat true consideration for giving the bill of sale, nor does it stat consideration as recited in the bill itself. A very material consi tion for which the bill was given is concealed in the notice.

(*a*) 17 V.L.R. 481.

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ents Act 1890 (No. 1103), provides by a form given in the hedule what should be stated (*b*). There was a guarantee the company for 1,000*l.*, and this being a material part of ideration should have been stated. The release given to was another material part of the consideration, and this is

The object of the notice is to warn creditors of the true f the transaction, and no part of the consideration must be d. The form in the schedule does not refer merely to money ation but provides for the whole nature of the transaction scribed. The real and actual consideration must be set forth: *Beetenson* (*c*); *Exparte Charing Cross Advance Bank* (*d*); *e's Law of Bills of Sale*, pp. 54, 55. "Consideration" some right, interest, profit, or benefit accruing to the one some forbearance, detriment, loss, or responsibility given, or undertaken by the other: *Currie* v. *Misa* (*e*). The nt must be sufficiently accurate to enable those who have pon or deal with the bill of sale to arrive at an accurate on as to what really took place: *Richardson* v. *Harris* (*f*); n v. *Wildon* (*g*). The learned primary judge no doubt a fact that the guarantee was not part of the consideration, appellants are not precluded in this appeal from disputing ling; it was merely an inference drawn from admitted facts, s very different from a finding of the facts themselves: *nnibanta* (*h*).

(*b*) FIFTH SCHEDULE.

NOTICE OF INTENTION TO FILE BILL OF SALE.

tor or Grantors.			Property Comprised in Bill of Sale.		Consideration.			Grantee or Grantees.		
ames in here the e a part- rm not ed, the e or style n.	Business or Occupation.	Place of Business or Residence.	Description.	Where Situate.	Past Debt.	Advance at time of giving Bill of Sale.	Future Advances.	Name or Names in full.	Business or Occupation.	Place of Business or Residence.

L.T. 808.
Ch. D. 35.
R. 10 Ex., p. 162.
(*f*) 22 Q.B.D. 268.
(*g*) 12 A.L.T. 17.
(*h*) 1 P.D. 283.

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Counsel also referred to the following cases: — *Exparte Challinor* (*i*); *Exparte Rolph* (*k*); *Exparte Winter* (*l*); *Morgan* v. *Griffiths* (*m*).

Madden, *Topp*, and *Isaacs* for the respondents—The judge has found as a fact that the guarantee was not part of the consideration, and that finding should not be disturbed. The evidence shows that this guarantee, though appearing in the deed, was not part of the consideration; the parties may go behind the deed and examine the transaction itself: *Exparte Collins* (*n*). The guarantee was a collateral agreement and quite distinct from the consideration. A collateral agreement is a promise by one party in consideration of which the other party agrees to enter into another contract, the terms and consideration of which are then ascertained by both parties, but the consideration is the thing given for the promise in any contract: *Angell* v. *Duke* (*o*); *Morgan* v. *Griffiths* (*m*). The question whether an agreement is a collateral agreement or not is a question of fact: *Lindley* v. *Lacey* (*p*). There is no promise to give a guarantee, and no action could be founded upon the deed itself for not giving the guarantee. The guarantee is referred to in the recital, but that is merely a history of the different transactions. The words "in consideration of the premises" mean "having regard to what has gone before." It is a draughtsman's phrase. The consideration refers to the pecuniary consideration, the amount to be secured. Unless the appellants can show that the notice does not comply with the Act then the bill of sale is not inoperative. If the consideration be untrue in the bill of sale itself, it does not invalidate the bill under the Victorian law, though it would under the English law: *Exparte Collins* (*n*).

Counsel referred to the following cases:—*Madell* v. *Thomas* (*q*); *Carter* v. *Salmon* (*r*); *Exparte Johnson* (*s*); *Mackenzie* v. *Coulson* (*t*); *Exparte Challinor* (*i*).

Higgins in reply.

Cur. adv. vult.

(*i*) 16 Ch. D. 260.
(*k*) 19 Ch. D. 98.
(*l*) 29 W.R. 575.
(*m*) L.R. 6 Ex. 70.
(*n*) L.R. 10 Ch. 367.
(*o*) L.R. 10 Q.B. 174.
(*p*) 17 C.B. (N.S.) 578.
(*q*) 1891, 1 Q.B. 230.
(*r*) 43 L.T. 490.
(*s*) 26 Ch. D., p. 348.
(*t*) L.R. 8 Eq. 368.

HIGINBOTHAM, C.J. This is an appeal from a judgment for the defendant by Hodges, J. The facts of the case are sufficiently stated in the judgment appealed from. The first and principal ground of objection relied on by the appellant raises a minute, but by no means unimportant, question as to what particulars are proper and necessary to be stated in the notice of intention to file a bill of sale required by sec. 184 of the *Instruments Act* 1890 to be lodged at the office of the Registrar-General, fourteen days before the bill is filed. In the present case the notice contained no mention of a guarantee which the defendant company agreed to give to the grantor Weidemann to secure an overdraft to him by a bank of a sum not exceeding 1,000*l.* for a period of twelve months. It was contended by the plaintiff that the omission of this guarantee from the notice invalidated the notice, and as a consequence prevented the bill of sale from acquiring any validity at law or in equity. The learned judge overruled the objection. He held that the guarantee was no part of the terms of the bill of sale, that it was not agreed that it should be put into the bill of sale, and that it was something entirely collateral to that instrument; and he concluded, therefore, that it was not required to be inserted in the notice. We are unable to concur with the reasons assigned by the learned judge for this conclusion.

The guarantee is a part of the recited "premises" in the bill of sale which are expressly declared to be the consideration of the instrument of transfer; the insertion of the guarantee in the bill of sale shows that it was the final intention of the parties that it should form a part of the substantive agreement between the grantor and the grantees, and it is impossible, under these circumstances, to regard it as a collateral agreement merely.

But while differing from his reasons, it does not follow that we should dissent from the conclusion arrived at by the learned judge upon this point. Assuming that the guarantee formed a part of the consideration of this bill of sale, it remains to be be determined whether it was necessary to insert it in the notice of intention to file the bill. In considering this question we are required, in my opinion, to abstain from giving a construction to the terms of the Act of Parliament which would render the conditions of a valid notice uncertain and difficult to be complied

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with. It was undoubtedly not the intention of the Legislature to create impediments, risk, and uncertainty in the way of honest transactions of this nature. The conditions imposed by Parliament on notice and on filing of bills of sale must be substantially observed, but those conditions should be strictly and narrowly construed, and, as far as may be possible, clearly defined, if the Act, instead of being a check to dishonesty, is not to be a snare and a pitfall for persons honestly and lawfully exercising the right of alienating their property. What then are the conditions of a valid notice of intention to file a bill of sale? Section 135 of the *Instruments Act* 1890 requires, first, that every such notice shall be in the form of the Fifth Schedule to the Act, or to the like effect; secondly, that such notice shall contain a statement of the *particulars* in such form mentioned; and, thirdly, that the notice shall specify an address to which notices of caveats may be posted.

The Fifth Schedule begins with a table with four cross-headings, below each of which there are two or three columns containing the items of information required to be furnished. The form of this table seems to me to explain the table. To my mind it appears clear that the items to be set forth in the several columns, and not the cross-headings, are "the particulars in such form mentioned" referred to in the section. The cross-headings are not "particulars;" they are obviously the general subjects within which are included the particulars to be set forth in the columns appended to each heading. The headings may include a vast number of particulars relating to each subject, but it is only those particulars which are expressly enumerated in the columns under each heading which have to be stated. It has been assumed in the argument for the appellant that the consideration of the bill of sale is required by the 135th section to be stated in the notice. This assumption appears to be founded not upon the terms of that section, which do not warrant it, but partly upon the language of the English Bills of Sale Act 1878 which expressly requires that a bill of sale shall set forth the consideration for which it was given, and upon the language used in English decisions based on that Act. The Victorian Act does not require the consideration for a bill of sale to be stated either in the bill itself or in the notice of intention to file the bill. The 135th section requires that a

past debt, an advance at the time of giving the bill of sale, and future advances should be stated in the notice. These particular considerations are all of them past, present, or future indebtedness in money, and they undoubtedly form, in by far the largest number of cases, the consideration for bills of sale given by way of security. But the consideration for such an instrument may consist of something wholly or in part different from money, and in such a case I think that the consideration need not be stated in the notice of intention to file the bill of sale, and that the notice will be good, although some or all of the columns may have to be left blank and unfilled. The terms of the notice itself appended to the tabular form in the Fifth Schedule support this view. Here the object of the bill of sale is stated to be "to secure the debt or advances above mentioned." These words appear to show conclusively that the consideration need only be stated where it consists of particulars of a debt, or of present or future advances. They also indicate, I think, a necessary limitation of the intended subject-matter of the notice which was suggested during the argument, namely, that the notice, was to state under the head of "consideration" what was the thing to be secured by the bill of sale, whatever that thing might be. This suggested meaning will be correct, in my opinion, if, but only if, the thing secured be a past debt, or present or future advances. Then, if particulars of consideration of the bill of sale, or of the thing secured by the bill of sale, are required to be stated only where a past debt, or present or future advances constitute wholly or in part the consideration of, or the thing secured by the bill of sale, was it necessary in the case before us to insert this guarantee in any of the three columns of the notice under the head of consideration? I am of opinion that it was not. A guarantee or promise to answer for the debt, default, or miscarriage of another person is something distinct in its nature from a past or present debt owing by, and a promise to make future advances to, that other person. The relation of principal and surety, and the relation of debtor and creditor may both constitute good consideration for a mortgage of personal chattels by bill of sale; but the Act of Parliament does not require that the particulars of the consideration springing from the relation of principal and surety should be included in the notice of intention

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to file the bill of sale. I am of opinion, for these reasons, that the learned judge was right in overruling this objection, founded on the absence of reference to the guarantee in the consideration stated in the notice of intention to file the bill of sale.

Four other objections were advanced on this appeal to a finding and to decisions of the primary judge. One of these was withdrawn during the argument. The remainder were either answered at the same time or they are covered by the view I have taken of the limited requirements of the notice as fixed by the Act of Parliament. In accordance with the opinion of the majority of the members of the Court, the appeal will be dismissed, with costs.

A'BECKETT, J. The question raised by this appeal is whether the notice of intention to file the bill of sale of the 22nd August 1889 complies with the Act. The statutory requisites are prescribed in a few words—a mere direction that "notice of the intention to file shall be in the form in the Fifth Schedule, or to the like effect, and shall contain a statement of the particulars in such form mentioned." We have therefore only to look at the schedule for the particulars required. This is headed, "Notice of intention to file bill of sale," and contains four columns respectively headed "Grantor," "Property comprised in bill of sale," "Consideration," and "Grantee." Below these columns are the following words:—"I, the above-named grantor, hereby give notice that a bill of sale made by me of the property above described to the above-named grantee to secure the debt or advances above mentioned will be filed after the expiration of fourteen days from the date of lodging this notice." This form is to be signed by the grantor, and it is obvious that the words at the foot constitute the operative part of the notice. The columns above these words are merely the receptacles in which to place the particulars to which the words at the foot refer. The discussion in this case has been confined to the third column, headed "Consideration," and subdivided into three sub-headings, "Past debt," "Advances at time of giving bill of sale," and "Future advances." The appellants contend that it is not enough to place in this column that which is referred to below as "the debt and advances above mentioned," unless the debt and advances constitute the only consideration for

the bill of sale, and that, if there is any other consideration, that other consideration must also be stated by adding another column, or making some other alteration in the form in the schedule. I do not agree with this contention. I think the third column is meant to contain the debt and advances to be secured, and nothing more, and that if these are correctly stated the Act is complied with, though there may have been some other consideration not stated.

The argument for the appellants rests altogether upon the force which it gives to the one word "Consideration" heading the column. Nothing else in the Act can be referred to as requiring the consideration to be stated. It is contended that the use of this word is equivalent to a declaration that the notice must contain particulars of the true consideration as well as of the debt and advances to be secured. Inasmuch as there was in this case consideration distinct from the amount to be secured, and not stated in the notice, it is said that the notice is bad and the bill of sale void. It cannot be denied that if the appellants' construction be correct there would often be great difficulty in complying with the Act by exactly ascertaining and defining that which constituted the consideration for giving the bill of sale. Such difficulties are well illustrated by the case of *Exparte Challinor* (*v*), and by the lengthy arguments addressed to us in this case, as to what should or should not be deemed to make up the consideration for the bill of sale before us. The appellants' argument makes the form in the schedule a trap for the unwary, who, thinking that he has followed the directions of the Act, is told that he has not given full force to the word "consideration," and that his security is therefore worthless. Any intelligent layman looking at the schedule would consider that he had complied with the Act if had stated the debt and advances to be secured in their appropriate columns. Nothing in the operative words of the notice, or in the table to be filled up above it, would suggest that more was required; the word "consideration" would seem properly to refer to that which he had written beneath it. This I think the correct view. Looking at the schedule as a whole, I read it as directing the person using it to fill into the column headed "Consideration" the debt and advances to be secured, and if this direction be complied with the column is

(*v*) 16 Ch. D. 260.

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used for the purpose intended, and all that is directed to be done has been done. The word "consideration" heading the column has no more enacting force than if it were a label on a shelf into which a Statute directed that a particular thing should be put. It would be enough to put that thing into the shelf though the Statute provided that the shelf should be labelled with a word large enough to describe something more than that which was to be put into it. "Consideration" at the top of the column is merely used as a short description of the debt and advances.

That this was the intention of the Legislature further appears when we remember that the notice is only required with reference to bills of sale given by way of security. The subdivision of the consideration is into three divisions, each of which expresses money secured. One of these divisions, that of "Past debt," does not properly express any consideration. Suppose a case in which a bill of sale is given only to secure a past debt of 1,000*l.*, and 1,000*l.* to be written in this column. According to the appellants' contention, the notice would be bad because the consideration would not be the past debt but the promised or anticipated forbearance of the creditor to enforce the debt. According to my view, the notice would be good, as the notice need only state the consideration in so far as it consists of the amount to be secured. On the whole I feel no difficulty in coming to the conclusion that the word "consideration" is governed by the operative words of the notice, and that the Act is complied with if the debt and advances intended to be secured are set out in the column headed "Consideration."

I have next to consider whether, on this view of the law, the notice is sufficient. The bill of sale was given to secure a past debt, and as to the specification of this past debt no objection was pressed by the appellants. The grantee also engaged to guarantee the grantor's overdraft with a bank to the extent of 1,000*l.*, or, if an overdraft could not be obtained, to make further advances to the grantor to the extent of 1,000*l.* The bill of sale was drawn so as to extend the security to any amount which might be paid under the guarantee, or for these further advances, and (as appears by the proviso for redemption and other clauses in the deed) it also covered any other advances which ths grantee might make to the grantor. The security given in respect

future advances, some of which the grantee was bound to required, others of which he might make at his discretion, referred to in the notice by the words, "Yes; if any," n the column "Future advances." I think these words . The word "yes" is mere surplusage; the words "if itten in the column would convey the meaning that any dvances which the grantee might make to the grantor e covered by the security. A clearer statement would be e, but I think the meaning can be gathered from the notice nds, and that therefore it complies with the Act. The dvances were in this case necessarily indefinite. Though tee could be compelled to make them to the extent of hey might not be required to that or to any extent; on hand they might be required, and the grantee might be o make them to a greater extent than 1,000*l*. If the e were given, and money had to be paid under it, such would come under the designation of future advances. advances, if any," comprises every kind of advance pro- by this bill of sale. There is nothing in the Act to the giving of a bill of sale to cover indefinite future dependent as to their amount upon the requirements of ower and the lender's willingness to satisfy them. Such a is an ordinary mercantile instrument, convenient to and lender. The Act does not purport to deprive them of to enter into such a contract. An oppressive restriction to ed amount cannot be spelt out of the form of notice, or be from any direction in the Act. As the borrower may give for undefined future advances, the notice descriptive of vances must necessarily be indefinite. It is no objection to e that it does not specify the nature or state the limit of nces to be secured when the bill of sale does not do so.

refore think that the debt and advances for which the bill f the 22nd August 1889 was given are sufficiently specified otice, that the bill of sale is good, and that the judgment the defendants should not be disturbed.

D, J. In this case Hodges, J., determined that a guarantee no part of the consideration of a bill of sale given by one

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Wiedemann to the defendants, and that therefore the bill of sale was valid, although the notice of intention to file it contained no reference to that guarantee. From that determination there was an appeal, which we have now to decide.

In arriving at the conclusion that the guarantee did not form a part of the consideration, the learned judge was, I think, in error, and it seems that this error must have arisen through his attention not having been directed to the words of the bill of sale itself. It does not follow, however, that because the reason for a decision may be wrong, the decision itself must necessarily fall, and accordingly it has been contended that this bill of sale is valid, even though the guarantee be part of the consideration, and be not set out in the notice. Two grounds have been suggested for this contention, both depending upon the construction of the form of notice provided by the Statute. One ground is that no consideration need be stated in the notice, unless it be one of those mentioned in the form in the schedule to the Act, and as a guarantee is not within any of them, therefore it need not be referred to. The other ground is that the form of notice prescribed does not necessarily require any consideration at all to be set out, but only the amount of debt or advance secured, and that therefore the bill of sale is valid, though no mention be made in the notice of this guarantee. The first holds that the consideration is required by the form; the other treats the consideration as a thing superfluous. According to the former, the consideration must be stated whenever it consists of one of the matters mentioned in the form; according to the latter, the consideration need never be stated, except when it is the thing secured by the bill of sale. The one construction interprets the heading "Consideration" as binding in certain specified cases, but in those cases only; the other treats that heading as a direction which may in all cases be safely disregarded so long as the amount secured by the bill of sale is set forth. Both of these views cannot be right. Each, however, receives the support of one of my learned colleagues, while I unfortunately cannot agree with either, for I have come to the conclusion that both the consideration for the bill of sale, and also the amount secured thereby, must be truly set out in the notice of intention to file.

whole question turns upon the proper interpretation of ctions and schedules of the *Instruments Act* 1890. s of sale that fall within sec. 134 of that Act are of any validity until registered, and such registra- not be legally effected until notice of intention to file of sale be lodged at the office of the Registrar-General. ice is to be in the form in the Fifth Schedule to the Act, like effect, and is to contain a statement of the particulars orm mentioned. Referring to the schedule, it appears that e four matters about which information is to be given, viz., tor, the property comprised in bill of sale, the consideration, grantee, and under each heading is stated the particular ion required. If we were to read this form as absolute and en only the information therein mentioned would be neces- hat is, the notice might be sufficient, if it set out the rs as they are set out in the form when they so exist, and ey do not so exist the notice could be silent. So that if rantee were the only consideration, there would be nothing ated in the columns under the heading "Consideration," efore no particulars given of it whatever, and the rest of e where it refers to the bill of sale to be given "to secure or advances above mentioned" would be unmeaning, as uld be neither debt nor advance anywhere referred to. Or e intrepretation be that the form must be rigidly complied might follow that no bill of sale could be registered at all re given for any other consideration than one of those d in the schedule. So that in this view a bill given in tion of a guarantee, either could not be registered as com- ith the requirements of the Act would be impossible, or else e registered upon a notice that disclosed neither the con- n nor the amount secured. I do not think that this view is or it assumes that the form in the schedule is a rigid guide for all cases. But by sec. 135 the notice is to be in the the schedule, or *to the like effect*. These words show that dule merely provides a general form for guidance suitable ary cases, and it becomes necessary in other instances to its real meaning in order to frame a notice to the like What is the effect of the notice? In an ordinary case it

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would disclose the nature of the consideration for which th
was given, and it would inform creditors what their debto
receiving in return for parting with his property. When, ther
one of the like effect has to be framed, why should not the
information be afforded? A creditor is entitled to prever
giving of a bill of sale, but unless he is supposed to act caprici
an important element in determining his interference would
knowledge of the value received by the debtor. The effect
form, therefore, as well as the wording, seems to me to requir
the nature of the consideration should be stated in every case.
the form, in my opinion, implies something more, for it gi
the ordinary case a statement of the "debt or advance" secu
the bill of sale. The notice states the bill is to be given
secure the debt or advances above mentioned." The only m
of debt or advance is under the heading of "Consideration,
the reason is that in nearly every case the consideration
matter secured by the bill of sale, and almost always tha
sideration takes the form of a past debt, a present, or a
advance. The effect of the form, therefore, is to state bot
consideration and the amount secured. The former is exp
named, and the latter is necessarily implied. Whenever this
can be truthfully followed both will be given, and whenev
consideration consists of all or any of the usual items, an
constitutes the sum secured, then the form can be literally foll
But when the consideration consists of something else, the
form must be modified so as to be of the like effect, and must
what the consideration is and what is the sum secured. Thi
struction does no violence to any of the language, but give
effect to every word, and is not opposed to any intention of
ment appearing anywhere on the face of the Statute.

The notice is required for the information of creditors to
them, if they wish, to prevent the registration of the bill of sale.
are therefore told the name, business, and address of grantc
of grantee, the description and situation of the property, the a
for which that property is to be mortgaged, and also the
sideration or value which their debtor is to receive in return.
very object of giving any particulars is in order that the cre
may exercise a discretion as to lodging a caveat, otherw

mere notice without any particulars would be sufficient. This being so the consideration and the amount secured are both of importance in enabling the creditors to understand the true nature of the transaction, and to judiciously exercise the power of veto. The ordinary form in ordinary cases discloses both, and so, in my opinion, in every case, whatever the true consideration may be, it must be accurately stated in substance, even though it be not one of the three matters mentioned in the form, and even though it should be necessary for the mortgagee to introduce a heading for himself—see *per* Holroyd, J., *Vaughan* v. *Wildon* (*x*)—and even though it be not the matter secured by the bill of sale. I cannot therefore read the form as only necessitating the statement of the consideration whenever it consists of one of the three sub-headings, nor, on the other hand, can I think that the word "consideration" is meant to be synonymous with "amount secured" or any like expression. This latter view no doubt receives support from the fact that one of the sub-headings under "Consideration" is "Past debt," for, strictly speaking, the consideration for the bill of sale is not the past debt but some promise, express or implied, not to enforce payment of that debt. But though this raises a difficulty, I cannot think it insurmountable. The words in an Act of Parliament are to be construed, if possible, in their ordinary natural and popular sense, and I prefer to hold that the Legislature has used language not strictly accurate, rather than infer that one thing has been said and another intended. In my opinion, therefore, when Parliament used the word "consideration" it meant to express thereby something which the grantor of the bill of sale was receiving or had received or would receive, and did not mean the almost direct contrary, viz., something which he had undertaken to pay. As this construction of the Act and schedule has not been complied with in the present case, I consider that this bill of sale is invalid.

There is another ground upon which I should have come to the same conclusion, though with more doubt. If the word "consideration" is to be construed as meaning "amount secured," then the money paid under the guarantee (if any) would be a portion of the sum covered by this bill of sale, and

(*x*) 12 A.L.T 17.

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should be stated in the notice. But the only words i notice that could possibly refer to this, are the words if any," written under "Future advances." This stat written under either "Past debt" or "Advance at time of bill of sale" would clearly be insufficient, and I think it is e unsatisfactory in its present position. To say that the a secured is "Future advances, if any," is to give little informat anyone, and I do not think that the Act contemplates a bill for undefined future advances. The amount of the past debt the present advance would have to be stated, and it seems that the amount of the contemplated future advance ought a be given. The notice refers to "advances above mentione being secured, implying, to my mind, the statement of some an and by sec. 148 of the Act the Registrar-General has to enter book relating to bills of sale "the sum for which the sam been given and the time or times, if any, when the same is th made payable." This book is to be open for inspection, evi for the purposes of information, and if there is any importa allowing the general public to know the sum for which the sale has been given, the same information ought surely afforded to creditors by the notice of intention to file at the when the knowledge may be of some use. This section I supports the construction I have adopted, and it seems to m the Act prevents debtors from mortgaging their property by sale for indefinite amounts, where the mortgagee would be no obligation to lend any sum whatever while obtaining ab control of the mortgagor's property to secure repayment of penny he may at his pleasure advance.

I have come to the conclusion that this bill of sale is invali reluctantly, because it has been found to be an honest and ge one. I also thoroughly appreciate the danger of Acts of Parli being made traps for business people conducting their transa honestly. But I am much more strongly impressed wit paramount importance of the Courts restraining themselv interpreting Acts of Parliament according to a fair understa of the words used. The intention of the Legislature is gathered from what has been said and, not from what ought, opinion, to have been said, and if there be any mistake or ha

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om the law, the duty and province of correcting it rests iament and not with the judges. In my judgment this ould be allowed, and with costs.

Appeal dismissed.

tors for appellants: *W. H. Lewis.*
tors for respondents: *Bullen & Winter.*

W. H. M.

DANBY *v.* ASKEW.

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1892
April, 29.
May 2.
June 2.

' Rules of the Supreme Court 1884"—*Order III., r.* 6—*Order XIV., r.* 1 *ially endorsed writ—Claim for interest on promissory note—Instruments* 90 (*No.* 1103), *ss.* 58, 207—*Supreme Court Act* 1890 (*No.* 1142), *s.* 224— *XIX., r.* 11—*Date of delivery on writ specially endorsed.*

writ specially endorsed for the recovery of the amount of a promissory im was made for interest at the rate of 8 per cent., "pursuant to the *t Act* 1890."

hat the writ was specially endorsed within the meaning of Order III., r. 6, e interest must be regarded as liquidated damages.

pecially endorsed need not have the word "delivered" marked on it, nor delivery at the end thereof.

AL from judgment.

was an appeal from the judgment of Williams, J., sitting nbers. The plaintiff applied for final judgment on a endorsed writ, under Order XIV., r. 1. The claim on the in the following form:—Statement of claim. The plain- m is as trustee of the property of Adam Henry Wilkinson, ent, against the defendant as maker of two several promis- es for the respective sums of 816*l.* 4*s.* 7*d.* and 820*l.* 4*s.* 11*d.*, ed 24th December 1889 and payable at three and four fter date respectively to the said insolvent, A. H. Wilkinson, and for interest pursuant to the *Instruments Act* 1890. ars:—

on promissory note dated 24th December 1889, due March 1890	816*l.*	4*s.*	7*d.*
hereon at 8 per cent. from 27th March 1890 to date t	133*l.*	8*s.*	4*d.*
on promissory note dated 24th December 1889, due April 1890	820*l.*	4*s.*	11*d.*
hereon at 8 per cent. from 27th April 1890 to date t	128*l.*	6*s.*	2*d.*
	1,898*l.*	4*s.*	0*d.*

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The plaintiff also claims interest on 1,636*l.* 9*s.* 6*d.*, part of the above sum of 1,898*l.* 4*s.*, at the rate of 8 per cent., from the date of this writ until payment or until judgment pursuant to the *Instruments Act* 1890.

The affidavit filed by the plaintiff in support of the summons was in the usual form. The defendant raised the objection that the writ was not specially endorsed, as it claimed interest which was in the nature of damages, and not arising out of any contract express or implied. There was a further objection that the date of delivery was not stated on the writ. The learned judge overruled the objections, and ordered final judgment to be entered for the amount claimed, with costs. From this decision the defendant now appealed.

Irvine for the appellant—It has been decided that interest arising by way of damages, and not upon a contract express or implied, cannot form the subject-matter of a specially endorsed writ: *Coane & Grant* v. *The Thomas Bent Land Company* (*a*). The interest is claimed pursuant to the *Instruments Act* 1890. Sec. 207 of that Act provides that interest, where not agreed upon, shall not be allowed at a higher rate than 8 per cent. Sec. 224 of the *Supreme Court Act* 1890 provides that "the Court at the hearing, or the jury on the trial . . . . may, if the Court or jury think fit, allow interest to the creditor at a rate not exceeding 8 per cent. . . . ." In both sections there is a limit placed on the rate of interest, and that rate cannot be ascertained until the trial. It has to be fixed by the Court or jury, and until that is done it is not liquidated. Sec. 58 of the *Instruments Act* 1890 no doubt provides that interest "shall be deemed to be liquidated damages," but that refers to the interest as allowed or fixed by the jury. In *Rodway* v. *Lucas* (*b*) in which a similar claim for interest was made, although the claim was allowed, it was on the ground that the defendant by not appearing admitted that the interest was due. Parke, B., in his judgment, says:—"It may turn out that it is not a liquidated demand; but, if so, the proper course was for the defendant to appear to the action, and then, as the endorsement

(*a*) 17 V.L.R. 198. (*b*) 10 Ex. 667.

is to be considered as particulars of demand, the claim would be confined to interest rightfully due by contract express or implied." *Humberstone* v. *Minchin* (*c*) is against the contention of the appellant, but it is contrary to the cases of *Coane* v. *The Thomas Bent Land Company* and *Rodway* v. *Lucas*.

Counsel also referred on this point to *Ryley* v. *Master* (*d*); *Webster* v. *British Empire Mutual Life Assurance Co.* (*e*).

The writ should also have contained the word "delivered." The specially endorsed writ is a statement of claim and a pleading: *Anlaby* v. *Praetorius* (*f*); *Whittlesea Land Co.* v. *Ure* (*g*). If it is a pleading, then it comes within Order XIX., r. 11., and must be marked on the face with the date of the day on which it is delivered.

[HOOD, J. It was decided in *Veale* v. *Automatic Boiler and Feeder Co.* (*h*) that this need not be done with respect to a specially endorsed writ.

Isaacs—That case was followed by Williams, J., in *The Bank of Victoria* v. *Perrin* (*i*)].

Isaacs for the respondents—In *Coane* v. *The Thomas Bent Land Company* (*k*) bills of exchange and promissory notes are excepted from the grounds of the decision. The point has been expressly decided by A'BECKETT, J., in *Humberstone* v. *Minchin* (*c*), and by Cave, J., in *In re Gillespie* (*l*). Cave, J., in the latter case, in dealing with the section corresponding with sec. 58 of the *Instruments Act* 1890 says:—"Now I am satisfied, as I have said, that the section is meant to provide for the damages, which may be treated as being liquidated damages for the purpose of being specially endorsed on the writ. . . ." If these matters referred to in sec. 58 are to be "deemed" to be liquidated damages, then they can be the subject-matters of a specially endorsed writ. The demand for interest cannot be "unliquidated," as the Act makes it "liquidated." In *Rodway* v. *Lucas* (*m*) Parke, B., makes an

(*c*) 18 V.L.R. 11.
(*d*) 1892 1 Q.B. 674.
(*e*) 15 Ch. D. 167, p. 179.
(*f*) 20 Q.B.D. 764.
(*g*) 16 V.L.R. 574.
(*h*) 18 Q.B.D. 631.
(*i*) 18 V.L.R. 137.
(*k*) 17 V.L.R. 198.
(*l*) 16 Q.B.D. 702.
(*m*) 10 Ex. 667, at pp. 673, 674.

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exception to the interest claimed upon promissory notes. The judge at the hearing of the application under Order XIV. has jurisdiction to deal with the matter of interest, and might disallow it, but if he has power at all to deal with it, it is clearly the subject-matter of a specially endorsed writ.

(Counsel was stopped by the Court as to the second point.)

Irvine in reply.

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. Appeal from an order of Williams, J., under Order XIV., r. 1, giving leave to the plaintiff to sign final judgment for the amount endorsed on the writ of summons. The action was brought by the plaintiff against the defendant as the maker of two promissory notes. The particulars endorsed on the writ claimed interest at the rate of 8 per cent. per annum from the due dates of the promissory notes to the date of the writ, and also interest at the same rate on the amounts of the promissory notes from the date of the writ until payment or judgment. The first ground of appeal taken was that a claim for interest cannot in any case form the subject of a specially endorsed writ, unless it appear by the endorsement, and be proved by affidavit, that the interest claimed is due by way of contract, and not as damages. *Coane and Another* v. *The Thomas Bent Land Company* (*n*) was cited in support of this contention. That was an action in which the plaintiff's claim was for work and labour done, and money paid, and for interest. But the rule as regards interest claimed on bills of exchange and promissory notes is different. Interest allowed by usage of trade on these instruments formed, previously to "*The Bills of Exchange Act* 1883," no part of the debt, but was in the nature of unliquidated damages, which had to go to the jury in order that they might find the amount: *Per* Bailey, J., in *Cameron* v. *Smith* (*o*). This distinction between debt and damages arising on a bill of exchange, or a promissory note, no longer exists. By sec. 58 of the *Instruments Act* 1890,

(*n*) 17 V.L.R. 198.

(*o*) 2 B. & Ald., at p. 308.

ure of damages, which shall be deemed to be liquidated shall be—"(A) The amount of the bill. (B) Interest rom the time of presentment for payment, if the bill is n demand, and from the maturity of the bill in any other) The expenses of noting, or when protest is necessary and st has been extended, the expense of protest." It follows nsequence of this provision that, subject to the limitation ate of interest prescribed by sec. 224 of the *Supreme ct* 1890, interest on the amount of a bill of exchange or a ry note is, like the amount of the bill or note itself, to be as liquidated damages, and accordingly may be specially upon the writ under Order III., r. 6. The order appealed therefore not open to objection on this ground, and it moreover, to be in accordance with the practice which has obtained under Orders III. and XIV., both in this Court English courts: See *per* Cave, J., *In re Gillespie, Exparte* (*p*).

second ground of objection taken to the order appealed s that the endorsement did not state on what day the statement of claim was delivered. The endorsement in nt case contains the word "delivered," and no more. The ndorsement on the writ is in the nature of, and is a state- claim: See *Anlaby* v. *Praetorius* (*q*), and *Whittlesea Land* v. *Ure* (*r*). It is contended that, being a pleading, the ndorsement comes within Order XIX., r. 11, and should be n the face, with the date of the day on which it is delivered. scribed forms of special endorsement contain the word ed" only: See Appendix C, sec. 14. The general form of y endorsed writ only contains the words "signed" and ," without the word "delivered": See Appendix A, Form No. 2. We concur in the view expressed in *Veale* v. *ic Boiler and Feeder Co.* (*s*), followed by Williams, J., in *Victoria* v. *Perrin* (*t*), that this objection is without sub- nd we should be yielding to a technicality if we allowed it. e of delivery of the endorsed statement of claim must

Q.B.D., at p. 706.
Q.B.D. 764.
V.L.R. 574.

(*s*) 18 Q.B.D. 631.
(*t*) 18 V.L.R. 137.

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necessarily be the same as that of the service of the writ on which the statement of claim is endorsed. Assuming that Order XIX., r. 11, applies to a statement of claim endorsed on a writ of summons, all the objects of that rule will be effected by the endorsement of the date of service of the writ, although the date of delivery of the endorsed pleading should not be filled up. The appeal will be dismissed, with costs.

Solicitors for appellant: *Brahe & Gair.*
Solicitors for respondent: *Braham & Pirani.*

W. H. M.

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May 3.

WATSON *v.* CAIN AND OTHERS.

The former practice of the Court, that a person interested in the residue was entitled as of course to a full administration of the estate, is now completely altered by Order LV., r. 10.

APPEAL from judgment.

This was an appeal from so much of the judgment of Hood, J., as amounted to a decree for the general administration of the estate of John Boyd Watson deceased. The testator by his will, *inter alia*, gave an annuity to the plaintiff until the period fixed in the will for distribution of his estate, when she was to take a share with the testator's other children and his grandchildren. By a codicil to his will the testator declared that if the plaintiff after his decease should marry without the consent, previously obtained in writing, of his trustees, the annuity payable to her should absolutely cease, and should fall into his residuary estate. The trustees having refused their consent to a marriage which the plaintiff desired to contract with a person named in the statement of claim, the action was brought praying the Court to declare that the defendant trustees had unnecessarily and improperly refused their consent to the marriage, and that they should give such consent in writing, or that the plaintiff should be at liberty to marry the person named without thereby causing any forfeiture of any interest taken by her under the will, *and praying* for a general order *for the administration of the estate.*

Upon the pleadings, the issue was joined as to whether or not the trustees had rightly withheld their consent to the marriage. Mr. Justice Hood decided that the defendant trustees were entitled to withhold their consent to the marriage, and made a decree for the general administration. The defendant trustees appealed against so much of the judgment as amounted to a decree for general administration of the estate.

Warrington Rogers, Q.C. (with him *Neighbour* and *Higgins*), for the appellants—There is no occasion in this case to make a general order for administration. Under the practice previous to the Order LV., r. 10, such an order would have been made as a matter of course. But, as stated by Mr. Brett in his *Leading Cases in Modern Equity*, "In no single department of modern equity has a greater revolution been introduced than in the practice which concerns the administration of estates." Thus in *In re Blake* (*a*), Lindley, L.J., says, "I hope that state of things is gone, and gone for ever; it was one of the greatest scandals of the profession. It is struck out, and I hope most effectively, by means of Order LV." In *In re Llewellyn* (*b*), an action brought for administration, North, J., even where the parties had agreed to minutes for a decree for general administration, refused to make the order, saying, "Rule 10 of Order LV. provides that 'it shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without an administration judgment.' I think this rule applies to the present action, and, so far I can see, the questions which arise can be properly determined without an administration judgment." And in *In re Wilson* (*c*), Pearson, J., says, "The rule, as I understand it, is this, that if there be a simple question as to whether or not a legacy has failed; as to whether or not the proper construction gives it to the survivors as a class, or any question of that kind; or even if there be a question as to whether or not some part of the property which has been realised ought to be treated as income

(*a*) 29 Ch. D., p. 918. (*b*) 25 Ch. D. 66. (*c*) 28 Ch. D., p. 457.

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WATSON v. CAIN.

or capital, or any isolated question of that kind, the decision of which would at once set at rest all differences between all the parties taking under the will, *the Court ought not* to give a judgment for the general administration of the estate, but ought to decide those questions separately, and apart from any administration." The present case comes distinctly within the English authorities upon the English order, which is in *ipsissimis verbis* with the colonial order, and the judgment for general administration is erroneous, and opposed to the practice established by Order LV.

Goldsmith—The judgment was by consent.

[HODGES, J. There was no consent; it was a judgment.]

Then the Order LV., r. 10, is *ultra vires*. There was power in the judge to make such an order under the *Judicature Act*, and if there was, then Mr. Justice Hood had exercised a discretion which he was entitled to do.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WEBB and HODGES, JJ.]. The Court has consulted Mr. Justice Hood, who states that he did not exercise his discretion, nor did he go into the general facts; but that, upon the counsel for the plaintiff asking for a judgment for general administration, the counsel for the defendant trustees said that he did not feel himself in a position to dispute the right to an order. The learned judge also states that if he had exercised his own judgment he should not have made the order, but that his attention was not drawn to Order LV., r. 10.

We consider that the judgment, so far as it decreed a general administration, is erroneous, and allow this appeal. The plaintiff to pay the defendant trustees their costs of the appeal; other parties to abide their own costs.

Appeal allowed.

[*This Report was kindly furnished by Mr. Warrington Rogers, Q.C.*]

REGINA *v.* WALSH AND O'BRIEN, EXPARTE DILNOT.

1892
May 25, 26.

Hodges, J.

County Court Act 1890 (*No.* 1078), *s.* 88—*Prohibition—Judgment signed by judge—Initials of judge—Judgment read by registrar after expiration of term of office of judge—Practice.*

By sec. 88 of Act No. 1078 it is provided that a County Court judge when he has reserved his decision may draw up the same in writing, and having duly signed the same may forward it to the registrar of the County Court, who, upon notice being given, may read it at the time and place notified.

Held, that a judgment bearing the initials of the judge is sufficiently signed within the meaning of sec. 88 of Act No. 1078.

Held also, that a judgment duly signed and forwarded by the judge, during his term of office, to the registrar may be read by the registrar, and shall have the effect of a valid judgment, although the reading thereof be at a time when the judge's term of office has expired.

RULE *nisi* for writ of prohibition.

This was a rule *nisi* for a writ of prohibition, calling upon Robert Walsh and O'Brien to show cause why they should not be prohibited from enforcing a judgment obtained by O'Brien in an action against Dilnot in the County Court, at Hamilton. Robert Walsh Esquire was acting County Court judge during a portion of the year 1892, and resumed his position as Prosecutor for the Queen on the 1st April 1892. The action of *O'Brien* v. *Dilnot* was tried before Mr. Walsh, in the County Court, at Hamilton, in the month of March 1892. Mr. Walsh reserved his judgment after the evidence was taken, and on or before the 31st March he forwarded to the registrar of the County Court, at Hamilton, his judgment in the action. This judgment bore Mr. Walsh's initials, "R. W." It appeared that an alteration was made in the signature by adding Mr. Walsh's full name, "Robert Walsh." The other material facts and the arguments are set out in the judgment.

Box for Mr. Walsh to show cause.

Cussen for O'Brien to show cause.

Fink for Dilnot to move the rule absolute.

Cur. adv. vult.

HODGES, J. This was an application by Dilnot, the defendant in an action in the County Court, at Hamilton, for a writ of prohibition to restrain the plaintiff O'Brien and Robert Walsh from

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Hodges, J.

enforcing a judgment which the plaintiff obtained in the C Court, at Hamilton, for 100*l.* and costs. It is sought to re the enforcement of that judgment upon two grounds. It is tended that the judgment was delivered in the County Cou Hamilton, by the registrar there reading the judgment aft term of office for which the judge had been appointed had ex The second ground being that the judgment was not signed judge before his term of office had expired.

It is provided by sec. 88 of the *County Court Act* 1890 tha any action, suit, matter, or proceeding brought in any County the judge of such court may, if he think fit, reserve his decisi any question of fact or law." The judge in this case did reser decision, and consequently that part of the section applies. section then goes on to provide that " where any such judge reserved his decision he may give the same at any continuati adjournment of such court, or at any subsequent holding ther he may draw up such decision in writing, and, having duly the same, forward it to the registrar or deputy registrar court." That is all that the judge has to do as provided by section. When he has forwarded his signed decision t registrar or deputy registrar of the court his duties with reg the judgment are ended; he has nothing more to do with it. section then goes on to provide what the registrar or deputy reg shall do, and it provides that he shall notify the parties or attorneys of his intention to read the judgment in the courth and he shall read the same accordingly, and when the registra read such decision it is to be of the same force and effect given by such judge in open court. Now it appears to me th soon as the judge has signed his decision, and forwarded it registrar, he has done all that he is called upon to do judi The time at which the registrar may read it is not any that is to be done during the time that the judge is in He has nothing to do with the reading of it; he has forw it to the registrar of the court, and it is signed, and the has to be done by the registrar of the court. I therefore that the first objection fails, as it is not necessary tha decision should be read in court during the term of offi the judge.

next objection was that the document, or the judgment, be signed during the term of office of the judge. It in this case that the judgment had at the foot of it ials of the judge; that those initials were put there on re the 31st March; and that on the 31st March the nt was forwarded with those initials to the registrar of rt at Hamilton. The judge's term of office, according pplicant's contention, expired at midnight on the 31st of It is said that those initials did not constitute a e. Under the 21st section of the English Wills Act ovided that no interlineation or other alteration made in l, after the execution thereof, shall be valid, unless such n shall be executed in like manner as is required for the n of the will, but the will, with such alteration as part shall be deemed to be duly executed if the signature of the and the subscription of the witnesses be made in the The "signature of the testator," under this Statute, has e matter of several decisions, and if there be his intials to teration it has been held to be sufficiently signed. And erhaps, is more remarkable, the initials are to be regarded as nature, although the signature at the end of the will was nitials. That was so decided in the case of *In the Goods vitt* (*a*). Now, if the requirements of the Wills Act can be by the testator putting his initials, I think it should be nt the requirements of sec. 88 are satisfied if the decision ng has at the foot of it the initials of the judge; especially be put there, as they appear to me to be, as his signature the evidence of his judgment. I think that in this case ust have been put there as the judge's signature and as e of his judgment, and they were there on or before the rch, and the judgment so initialled was forwarded to the Court at Hamilton on or before that day; and as he was office, I think that the requirements of the Statute have mplied with, and that I should not prohibit the enforcement judgment.

ppears from the affidavit, or it is suggested, that something ed to that judgment afterwards, and after Mr. Walsh was

(*a*) 5 P.D. 116.

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out of office. If anything were so added afterwards, a Mr. Walsh were out of office, it simply was an unauthorised a tion by persons who had no right to alter the judgment i way, and there would be no more reason for preventing judgment from being enforced than if some alteration were in the office of the County Court. It is not pretended that altered in substance; it is only suggested that "obert" was after "R.," and "alsh" after "W." It is then said th judgment was not read, because it was read with those other at the bottom of it, but those letters were not read.

There were a number of technical objections in this case I desire to offer no opinion upon at the present time, b calling attention to them. I doubt very much whethe judgment should be prohibited without the registrar being upon to show cause. I cannot see, if the applicant's content correct, why Mr. Walsh is here at all. If he be judg judgment should be enforced; if he be not judge, there suggestion that he is desirous of enforcing something with he has nothing to do, and it is useless to prohibit him doing something which he did not intend to do. The rul taken out before a judge, and returnable before the Court. nothing at present about this, but persons taking these proce should look to this. I might have discharged the rule technical objections, as I think it is quite right to mee technical objection by another. But in my opinion the rule s be discharged on its merits.

Rule discharged, with cos

Solicitors for applicant: *Hart & Benjamin.*
Solicitors for Dilnot: *Ford & Aspinwall.*
Solicitor for Walsh: *Guinness*, Crown Solicitor.

W. H.

MILIANI *v.* VICTORIAN RAILWAYS COMMISSIONERS.

F.C.

1892
Feb. 11.

Notice of action—Railways Act 1890 (*No.* 1135), *s.* 119—*Sufficiency of—Whether notice clearly and explicitly set forth "nature of intended action and cause thereof."*

The notice of action, in pursuance of sec. 119 of the *Railways Act* 1890, set forth that the plaintiff intended to issue a writ against the defendants, for that the defendants, on the 20th day of January 1890, by their negligence or by the negligence of their servants, inflicted personal injuries upon the plaintiff to the damage of the said plaintiff of 1,000*l.* At the trial it was contended by the defendants that this notice was insufficient, as it was not in compliance with the provisions of sec. 119 of the *Railways Act*, which provided, *inter alia*, that "such notice shall clearly and explicitly set forth the nature of the intended action and the cause thereof."

The learned judge held the notice insufficient, and the plaintiff was nonsuited. Upon a motion for a new trial on the ground that the learned judge was wrong in holding the notice insufficient,

Held, that the primary judge was right, and that the notice was insufficient. That the notice did sufficiently set forth the nature of the intended action, but did not clearly and explicitly set forth the cause thereof, and motion for a new trial refused.

MOTION for a new trial.

The plaintiff sued the Victorian Railways Commissioners for injury caused to him by their negligence, or that of their servants. The notice of the intended action delivered by the plaintiff to the defendants, pursuant to the requirements of sec. 119 of the *Railways Act* 1890, stated that the plaintiff intended to issue a writ against the defendants "for that you, the said Victorian Railways Commissioners, on the 20th day of January 1890, at Ballarat, by your negligence or the negligence of your servants, inflicted personal injuries upon the said Olivio Miliani to the damage of the said Olivio Miliani of 1,000*l.*"

Sec. 119 of the *Railways Act* 1890 provides, *inter alia*, that no writ shall be sued out against the commissioners until notice in writing has been served on the commissioners. The section further provides: "Such notice shall clearly and explicitly set forth the nature of the intended action, and the cause thereof." At the trial before Hood, J., and a jury of six, it was contended by the defendants that the notice was insufficient, as it did not comply with these terms of the section. The learned judge held that the notice was insufficient, and nonsuited the plaintiff. A

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new trial was moved for on the ground that the learned p judge was in error in holding that the notice of actio insufficient.

Barrett for the plaintiff in support.

Box (with him *Purves*, Q.C., and *Bryant*) for the defend oppose.

The following authorities were cited during the argume *Towsey* v. *White* (*a*); *Taylor* v. *Nesfield* (*b*); *Mason* v. *Birk Improvement Commissioners* (*c*); *Keen* v. *Milwall Dock C Union Steamship Co. of New Zealand* v. *Melbourne H Trust Commissioners* (*e*); *Jones* v. *Bird* (*f*); *Smith &* *West Derby Local Board* (*g*).

HIGINBOTHAM, C.J., delivered the judgment of the [HIGINBOTHAM, C.J., WILLIAMS and HODGES, JJ.]. The qu to be decided upon this motion for a new trial is whether the of action given by the plaintiff to the defendants is suffici being in compliance with the terms of sec. 119 of the *Ra Act* 1890, which requires that "such notice shall clearl explicitly set forth the nature of the intended action and thereof." Effect ought to be given, and it can be given, t word of this provision; at any rate it can be given to the "clearly and explicitly." The nature of the intended actio be stated in the notice. I think, in the present case, th nature of the intended action is sufficiently set forth. It a in the notice that the plaintiff intends to issue a writ agai defendants for the negligence of the defendants, or their offi servants, by which negligence personal injuries were inflicted plaintiff, and that the plaintiff intends to claim damages extent of 1,000*l*. Now, actions may be of various natures may be personal or *in rem*; they may claim damages or som remedy; may be against a person or a suit for the recovery o

(*a*) 5 B. & C. 125.
(*b*) 3 E. & B. 724.
(*c*) 6 H. & N. 72.
(*d*) 8 Q.B.D. 482.
(*e*) 9 App. Cas., 365, at p. 3 8 V.L.R. 167.
(*f*) 5 B. & Ald. 837.
(*g*) 3 C.P.D. 423.

This notice shows that the plaintiff meant to bring a proceeding of a particular kind, namely, a personal action for negligence, claiming damages by means of a writ issued out of the Supreme Court. So far the notice satisfies the requirements of the section.

The further question remains as to whether this notice states sufficiently the "cause thereof." We are of opinion that it does not. The notice does set forth a cause of action, that is, negligence, resulting in personal injuries to the plaintiff; but that cannot be said to be the particular cause in respect of which the plaintiff is suing the defendants. Two cases cited for the plaintiff during argument are, when examined, against him, and not in his favour. In *Jones* v. *Bird* (*h*), the notice was held to describe sufficiently the cause of action. In that case the notice stated that the defendants did by themselves, their servants or workmen, make, alter, cut, etc., certain sewers, etc., running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner that it fell down. In this case the notice was equivalent to a charge of negligence against the defendants in the nature of an alternative claim, for by the declaration and proof given in the action, it appeared that the damage to the plaintiff's house happened through the fall of a stack of chimneys in one of several houses close to the plaintiff's house, and the notice would not lead the defendants to suppose that it was in consequence of the fall of the chimneys that the damage was caused. The notice merely points at some negligence on the part of the defendants, resulting in alleged injury to the plaintiff. Lord Chief Justice Abbott, before whom this case was heard, cannot be regarded as a special authority on this particular branch of the law, and we do not think the decision in that case should bind us in the present one. The distinction to be drawn is between a cause and the cause. In the case of *Smith & Co.* v. *West Derby Local Board* (*i*), the precise cause of action was fully set forth in the notice. There the notice stated that the plaintiffs intended to enter a plaint against the defendants for the injury and damage caused to them through the defendants, by matters or things done or omitted to be done by them and their labourers, servants, etc., to wit, that they did by

(*h*) 5 B. & Ald. 837. (*i*) 3 C.P.D. 423.

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themselves, their labourers and servants, "negligently, carel and improperly leave a certain portion of the highway i insufficient and improper state of repair, whereby" damag inflicted on the plaintiffs. Lindley, J., says, in giving the gr of his judgment, "I think it" (the notice) "fairly conveys t minds of the defendants what is the particular negligence which they are charged." The notice in the present case in the defendants that on a certain day at Ballarat "you, by negligence, or the negligence of your servants, inflicted pe injuries upon the plaintiff to the damage of the said plain 1,000*l.*" No information is given as to the means by, or the mode in which, the injury was inflicted. There are many wa which it may be sought to be proved at the trial that inju inflicted on the plaintiff. The section requiring that the of action is to be clearly and explicitly stated means tha particular cause of action is to be set forth in the notice. object of the section is a reasonable one, and is tha defendants should have clear particulars afforded to them in to enable them to ascertain the mode in which the plainti injured, and the extent of his injuries. The present notic not set forth clearly and explicitly the cause of the intended We are of opinion that the learned primary judge was ri holding that the notice of action was insufficient, and the for a new trial will be refused, with costs.

Solicitors for plaintiff: *Morgan & Gill*, for *H. S. Barret*
Solicitor for defendants: *Guinness*, Crown Solicitor.

A. F

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March 4, 7, 8, 9, 10, 11.
April 8.

Instruments Act 1890 (*No.* 1103)—*Part VI.*—*Act No.* 557—*Act* 13 *Eliz.*, *c.* 5—*Sale to defeat, etc., creditors—Consideration—Bill of sale—Absolute transfer—Necessity for filing.*

In order to avoid a sale under the provisions of the Act 13 Eliz., c. 5, as being made with the intention of defrauding, defeating, and delaying creditors, it is necessary that good consideration shall not have been given, and that the person to whom the property is assigned shall not have received it *bonâ fide*, and with notice of the fraud of the assignor.

Act No. 557 (with the exception of sec. 11), re-enacted by the *Instruments Act* 1890, excluded from its application all bills of sale other than those given by way of security. Accordingly, a document which is an absolute transfer, and under which possession is given, need not be filed in the manner prescribed for a bill of sale by way of security.

Young v. *Mook Ah Meng* (17 V.L.R. 140) affirmed.

THIS was a motion for a new trial by the defendant, an appeal by the defendant from so much of the judgment as was in favour of the plaintiff, and an appeal by the plaintiff from so much of the judgment as was in favour of the defendant.

On the 24th of December 1889, one Wilkinson sold to Askew the plaintiff all his business and stock-in-trade, and the document by which the sale was effected, and under which the plaintiff took possession of the goods and premises absolutely transferred the said business and stock-in-trade for the consideration therein expressed. Soon after this, early in January 1890, Wilkinson voluntarily sequestrated his estate. Immediately after the document of the 24th December 1889 (set out fully in the judgment of A'BECKETT, J.) had been signed, the plaintiff took possession of the purchased property, and sold and bought largely in the ordinary course of business until he was stopped by the seizure of the goods in March 1890 by Wilkinson's trustee in insolvency, the father of the present defendant; the present defendant was elected as successor to his father in the trust, and sold the goods seized by his predecessor. After the seizure of the goods the plaintiff brought the present action, and sued the defendant for trespass in entering and taking the goods, in trover for the conversion of the goods, and in detinue for the detention of certain trade books. The defences set up by the defendant were—1st, that the sale to the plaintiff by Wilkinson was a sham sale; 2nd, that it was fraudulent

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and void under 13 Eliz., c. 5; 3rd, that it was fraudulent and void under sec. 71 of the "*Insolvency Statute* 1871," in that it was a fraudulent preference of one Burkitt, a creditor of Wilkinson; and 4th, that the alleged sale was not made in the ordinary course of business, and the document of the 24th December 1889, whereby it was effected, was a bill of sale invalid by reason of non-registration. At the close of the case, which was tried before A'Beckett, J., and a jury of six, the following questions were submitted to the jury, who returned the answers to them here set out:—

1. Was the alleged sale by Wilkinson not a real but a sham sale, not intended by either Wilkinson or the plaintiff to pass the property, or any of it, to the plaintiff?

2. Was the alleged sale made by Wilkinson, as the plaintiff knew, at a time when Wilkinson was greatly indebted, and for the purpose and with the intention of defrauding, defeating, and delaying the creditors of Wilkinson, and without any valuable consideration?

3. Was Wilkinson, at the time of the alleged sale, as the plaintiff and Burkitt well knew, unable to pay his debts as they became due from his own money, and was the alleged sale made in favour of plaintiff in trust for Burkitt, and, as Burkitt then well knew, of giving Burkitt a preference over the other creditors?

Answer to questions 1, 2 and 3: We think that it was a real and not a sham sale, and was for valuable consideration, and was not in trust for Burkitt.

4. Assuming that the plaintiff is entitled to damages for the seizure and sale of goods bought and paid for after the purchase from Wilkinson, what damages do you give for the seizure of such goods?

Answer: 1,000*l.* damages.

5. Do you find that any of the goods seized by the defendant were goods which had been bought on credit, and not paid for at the time of seizure?

Answer: Yes.

6. If you answer yes to question 5, what damages do you give for the seizure and sale of such goods?

Answer: 475*l.* damages.

7. What damages do you give for the seizure of the trade books bought by the plaintiff?

Answer: 1*l.* damages.

8. If you answer questions 1, 2, and 3 in favour of the plaintiff, what damages do you give in addition to the damages under questions 4, 5, 6, 7?

Answer: 3,800*l.* damages.

9. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the defendant from those included in the sale by Wilkinson?

Answer: No.

10. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the plaintiff from those included in the sale by Wilkinson?

Answer: Yes?

11. Was the plaintiff offered by the defendant an opportunity for distinguishing and removing the goods so subsequently bought before the defendant sold them with the other goods?

Answer: No.

12. Had the plaintiff's tenancy of Bradford House been determined by operation of law when the defendant seized in November 1890?

Answer: Yes.

13. If you say no to question 12, what damages do you give for trespass in entering Bradford House?

Upon these findings the plaintiff moved for judgment for 5,276*l.*, with costs. His Honor held, however, that inasmuch as the document of the 24th of December was a bill of sale, and void for non-registration, it did not pass the property in the goods comprised in it to the plaintiff, and, therefore, the plaintiff was not entitled to the 3,800*l.* damages for the seizure of these goods. His Honor gave judgment for the plaintiff for 1,475*l.*, as appears at the close of his judgment. The following is His Honor's judgment:—

A'BECKETT, J. This is an action to recover damages for the seizure and sale of plaintiff's goods, for the disturbance of the plaintiff's possession as tenant, and for the detention of his trade books. The defendant denies that the goods seized were the plaintiff's, and alleges that they belonged to one Wilkinson, who

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voluntarily sequestrated his estate 7th January 1890, that they were sold by him to the plaintiff 24th December 1889, and that this was not a real but a sham sale, that it was in fraud of creditors, and without valuable consideration, and by way of fraudulent preference of one Burkitt. He also contends that the document under which the transaction was effected was a bill of sale, wholly invalid for want of registration. Immediately after this document was signed the plaintiff went into possession of the purchased property, consisting of the stock-in-trade of a draper. He sold largely and bought largely in the ordinary course of business until he was stopped by the seizure of the goods in March 1890 by Wilkinson's trustee in insolvency, the father of the present defendant, who was elected as his successor in the trust, and sold that which his predecessor had seized. This consisted of the original stock and of new goods bought by Askew. As to these new goods, the defendant pleads that most, if not all, of them were bought out of the proceeds of sale of the original goods, and that if there were any not so bought, they were small in quantity, and were so mixed up with the other goods as to be indistinguishable by the defendant, and that he was always willing to return them to the plaintiff on his pointing them out. The questions raised by the pleadings were so complicated and the rights of the parties were so different as to the different descriptions of goods seized, that I could not properly ask the jury for a general verdict for plaintiff or defendant, and I therefore sent them specific questions on all the matters of facts in issue. The question of whether the document of 24th December was a bill of sale, which required registration, was a matter of law. It involved the consideration of facts, but as the evidence on the subject was all one way I did not consider it necessary to submit any question upon it to the jury. After the jury had answered the questions, I heard arguments on motion for judgment. The most important point argued, involving the plaintiff's right to the damages of 3,800*l.*, given in answer to question 8, was as to the non-registration of the bill of sale. This document is in the following words:—

"Melbourne, 24th December 1889.

"In consideration of the sum of 5,325*l.* to be paid to me as hereinafter mentioned, by George Askew, of North Fitzroy, draper, I do hereby sell, assign, and transfer to

him all my stock-in-trade, goods and fixtures, and chattels in, upon, and about my premises, known as Bradford House, 165 St. George's Road, North Fitzroy. Payments to be made as follows:—500*l.* cash; balance by approved bills in equal amounts, at one, two, three, four, five, and six months, with interest at 6 per cent.

"A. H. WILKINSON.

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"Witness—M. J. S. Gair.

"Received from Mr. Askew the sum of 500*l.*

"A. H. WILKINSON."

An absolute transfer, not by way of mortgage or security, is within the definition of the Act: See *Swift* v. *Pannell* (*a*); *Yarnton* v. *Taylor* (*b*). An equitable assurance is within the Act: *Yarnton* v. *Taylor*. If a good transaction can be proved without having recourse to a document such as that of the 24th December, the transaction will not fall because the document is not registered. See the law on this subject fully stated in *Newlove* v. *Shrewsbury* (*c*), and lately acted on by this Court in *Young and Others* v. *Mook Ah Meng* (*d*). In the present case there was no transaction without the document. No binding bargain was entered into. The parties were in doubt if any sale could be made, until they went to the solicitor, who reduced into writing the agreement, which Wilkinson signed. The plaintiff says, in cross-examination, "There was no formal arrangement until the document was signed. That is the document under which I claim." None of the evidence is in conflict with this statement. Without this signed document there would have been no transaction between the parties. The subsequent taking possession was under authority derived from it. I have, therefore, no doubt that, according to the authority of cases in our own and in the English courts, this document required registration. It has, however, been argued that, though it may have required registration, the omission to register is immaterial, inasmuch as the goods did not remain in the apparent ownership of the vendor, and that the only consequences of non-registration are those described in the words, "Otherwise, etc.," in sec. 59 of Act 204. The defendant's contention is that the words of sec. 1 of Act 557, "No bill of sale shall be operative or have any validity at law or in equity until filed," make the document void to all intents and purposes, notwithstanding that possession under it was taken

(*a*) 24 Ch. D. 210.
(*b*) 13 V.L.R. 903.
(*c*) 21 Q.B.D. 41.
(*d*) 17 V.L.R. 140.

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before the insolvency of the grantor. I have had occasion to consider this point before, and my views on it are expressed in the case of *McCarthy* v. *Nicholls* (*e*). I agree with the defendant's contention. This construction may occasion inconvenience and hardship, but it does not involve any more trenchant curtailment of the rights of ownership than was directly aimed at and accomplished by Act No. 557. By this an owner of chattels was deprived of the right to mortgage them if any creditor objected to his doing so, and it is little more to say that he shall not transfer them by written instrument out of the ordinary course of business if any creditor objects to his doing so. Whatever may be thought of the result of my interpretation of sec. 1, it seems to me inevitable from the language used. As against this construction it may be said that the words "otherwise, etc.," retained in sec. 133 of the Consolidating Act are thereby reduced to surplusage, should have been omitted, and are misleading, but I think that their retention cannot be considered as a legislative declaration of the law upon a point left doubtful when the Acts consolidated were in force. As against my construction, in addition to the case referred to in my previous decision, *Perl* v. *Richardson* (*f*) might be cited, and there are observations in *Yarnton* v. *Taylor* which seem to treat apparent ownership as still material. The question raised in argument is important, and I would have reserved it for the Full Court if I had not already given effect to my views in a previous case. I hold the bill of sale void at law and in equity for want of registration, notwithstanding that possession was taken directly after it was signed. I hold that the plaintiff had no right to the goods sold to him unless derived from the bill of sale, and therefore that the plaintiff is not entitled to the 3,800*l.* damages given for seizure of these goods.

As to the damages of 1,000*l.* given in answer to question 4, the defendant contends that, inasmuch as these goods were bought with the proceeds of the sale of the goods comprised in the bill of sale, they became the defendant's goods, citing in support of this contention *Hallett's Case* (*g*). The facts were that all moneys received in the business were paid into the plaintiff's bank account,

(*e*) 8 A.L.T., p. 180. (*f*) 8 A.L.T. 63. (*g*) 13 Ch. D. 696.

whether they were the price of old goods or of new goods, and whether of new goods bought for cash or on credit, and that new goods were paid for by cheques on this account. There was a seizure on the 7th of January, but the officer of the trustee was turned out, and the plaintiff's possession was resumed, and continued until March, and during all this time selling and buying went on. It is admitted that the bill of sale gave leave and license to sell until revoked by the seizure on 7th January. Up to this date at least the plaintiff had full right to receive proceeds and do what he liked with them. As the jury have found the transaction honest, I think no fiduciary character in relation to the defendant within the principle of *Hallett's Case* or of *Taylor* v. *Plumer* (*h*) can be attached to the plaintiff's receipt of proceeds after the sale. Part of the money employed in the purchase of new goods may have been the price of goods bought on credit, as to which the trustees could claim no right. The purchase money of new goods cannot be attributed exclusively to the proceeds of goods to which the defendant was entitled. I think that the defendant could not lawfully treat as his the goods bought by the plaintiff. The seizure was not an act which would incline the Court to strain equitable doctrines to help the defendant out of a difficulty. It was an assertion of legal title without any regard to equities. Instead of bringing an action to set aside the sale, to have accounts taken, and offering to account for purchase money received—in which action a receiver might have been appointed—the trustee, who had received part of the price, seized and sold all the goods which he could lay his hands on, and did nothing to adjust the rights which arose on the sale being set aside. He forcibly asserted his legal rights, and the Court ought not to give him more than his clear legal rights in this action, in which the equities between the parties as to accounts of proceeds received and as to purchase money paid cannot be settled. I hold the plaintiff entitled to the damages of 1,000*l.* under the answer to question 4.

As to the damages of 475*l.* under the answer to question 6 there has been little discussion. The plaintiff is clearly entitled to these damages on the jury's findings. As to the books, I order the defendant to return the books which were purchased by the plaintiff within

(*h*) 3 M. & S. 562.

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one month from this date, and I reserve liberty to either party to apply as to such books; or, if plaintiff prefers it, I shall make no order for return, and add 1*l.* to his general damages. As to costs, I think it is difficult to apply Rules 1 and 2 of Order LXV. The event has been decided in favour of the plaintiff, but he fails as to part of the goods in respect of which the action has been brought. He also fails in the issue of law raised as to the bill of sale. He also fails to make out any case of disturbance of tenancy. According to the decision of the Full Court in *Slater* v. *Shire of Colac* (11th of July 1891), the Court ought not to anticipate the difficulties which the taxing officer will have to deal with by giving any special direction to remove them. The only costs to which I think the defendant properly entitled are such as are distinctly attributable to the assertion and attempted proof of tenancy of Bradford House, and to the claim in respect of the goods comprised in the bill of sale as distinguished from the other goods seized, but I think that on this second head no costs exclusively attributable to the claim to such goods could be found. To enable the defendant to make what he can of the successes to which I have referred I shall follow the course prescribed by *Slater* v. *Shire of Colac*. I give judgment for plaintiff for 1,475*l.*, with costs of the action, except the costs of the issues on which the defendant has succeeded, plaintiff to pay the defendant the costs of such issues. Direct defendant within one month from this date to deliver to the plaintiff the books purchased by him after the 24th December 1889. Liberty to either party to apply as to such books.

From this judgment the plaintiff and defendant both appealed, and the defendant moved for a new trial. These motions were by consent argued together.

Topp and *Isaacs* for the defendant.

Madden and *Irvine* for the plaintiff.

Topp—The jury have never answered the part of question 2 as to whether the sale was made by Wilkinson to defeat and delay creditors; therefore there must be a new trial. A sale may be a real sale, and for value, and yet may be one to defeat and delay creditors.

Madden (called by the Court on the point as to whether this question had been sufficiently answered)—A real *bonâ fide* sale and good consideration is all that is necessary: *Twyne's Case* (*i*); *Wood* v. *Dixie* (*k*); *In re Ward* (*l*); *Latimer v. Batson* (*m*). "*Bonâ fide*" means a real sale.

Topp, resuming, cited *May on Fraudulent and Voluntary Dispositions of Property* (2nd ed.), pp. 80, 81, 84, 85. This document should have been filed, because it comes within the provisions of sec. 1 of the Act No. 557. See also secs. 56 and 63 of the "*The Instruments and Securities Statute* 1864" (No. 204), requiring that bills of sale, whether made absolutely or not, must be filed, and defining what instruments are a bill of sale.

[WILLIAMS, J. All the Acts aim at is the case where the property remains in the possession of the vendor.]

In *McCarthy* v. *Nicholls* (*n*) the grantee of chattels under a bill of sale took possession, and it was held the document must be filed. The Act No. 557 applies to absolute transfers, as well as those made by way of security. Only one exception is made by sec. 13 of the Act No. 557, viz., a bill of sale made under or in execution of any process, and, therefore, it is plain that no other class of bill of sale is excepted. Sec. 17 of the Act No. 557 provides that that Act is to be read with Part VII. (*i.e.*, secs. 56-63) of the Act No. 204. Sec. 1 of the Act No. 557 provides that "No bill of sale" shall be operative till it is filed in conformity with the requirements of sec. 56 of Act No. 204.

Madden and *Irvine* for the plaintiff—First, on the motion for a new trial—(Counsel was stopped by the Court).

On the plaintiff's appeal—This document did not require to be filed. In all the cases on the point the document was either manifestly given as a security or else the goods remained in the apparent possession of the grantor. In this case I say possession was given to the grantee, and the document was in no way necessary except as a piece of evidence of the honesty of plaintiff.

(*i*) Sm. L.C. (9th ed.), at p. 23.
(*k*) 7 Q.B.D. 892.
(*l*) 14 V.L.R. 733.
(*m*) 4 B. & C. 652.
(*n*) 8 A.L.T. 180.

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The following authorities were also cited on this part of argument: *Black* v. *Zevenboom* (*o*); *Young* v. *Mook Ah Men* (*p*); *Newlove* v. *Shrewsbury* (*q*); *The North Central Wagon Co.* v. *Manchester, etc., Railway* (*r*); *McDevitt* v. *Kattengall* (*s*); *Marsden* v. *Meadows* (*t*); *Yarnton* v. *Taylor* (*v*); *Re Parsons*, *Exparte Hubbard* (*x*); *Edwards* v. *Edwards* (*y*); *In re Shaw* (*z*); *Perl* v. *Richardson* (*a*); *Cohen* v. *McGee* (*b*); *Glen* v. *Abbott* (*c*); *Swift* v. *Pannell* (*d*).

On the question of the commixture of goods, arising from answers by the jury to questions 9 and 10, were cited: *Story on Bailments* (7th ed.), p. 40; *In re Hallett's Estate* (*e*).

Cur. adv. vu

HIGINBOTHAM, C.J., delivered the judgment of the [HIGINBOTHAM, C.J., WILLIAMS and HOOD, JJ.]. A motion by defendant for a new trial; an appeal by the defendant from judgment of the learned primary judge in favour of the pla awarding him 1,475*l.* and the general costs of the action; a appeal by the plaintiff from a portion of the judgment, ha consent, been argued together.

The plaintiff was the transferree, under a document 24th December 1889, whereby, in consideration of the su 5,325*l.* to be paid by him, one A. H. Wilkinson purported t and transfer to the plaintiff all his stock-in-trade, goods, fix and chattels upon the premises known as Bradford House in Fitzroy, where Wilkinson carried on the business of a draper. defendant on 28th October 1890 became trustee in insolvency estate of Wilkinson.

The plaintiff sued the defendant on three counts, for tre in entering and taking his goods, in trover for the conv of his goods, and in detinue for the detention of the

(*o*) 6 V.L.R. (L.) 473.
(*p*) 17 V.L.R. 140.
(*q*) 21 Q.B.D. 41.
(*r*) 35 Ch. D., Fry, L.J., at p. 215.
(*s*) 5 V.L.R. (L.) 89.
(*t*) 7 Q.B.D. 80.
(*v*) 13 V.L.R. 903.
(*w*) 16 Q.B.D. 532.
(*x*) 17 Q.B.D. 690.
(*y*) 2 Ch. D., at p. 297.
(*z*) 9 V.L.R. (I.) 16.
(*a*) 8 A.L.T. 63.
(*b*) 4 V.L.R. (L.) 543.
(*c*) 6 V.L.R. (L.) 483.
(*d*) 24 Ch. D. 210.
(*e*) 13 Ch. D., at pp. 707, 719.

the business. The defendant set up four distinct defences whole action. He pleaded, first, that the sale on ecember 1889 was not a real, but a sham sale; secondly, e sale was fraudulent and void under 13 Eliz., c. 5, as it n made for the purpose and with the intention of defrauding, g, and delaying the creditors of Wilkinson, and without any e consideration; thirdly, that the transfer was fraudulent d within sec. 71 of the "*Insolvency Statute* 1871," as it de to and in favour of the plaintiff in trust for Burkitt, a of Wilkinson, with the view, as the plaintiff and Burkitt ell knew, of giving Burkitt a preference over the other s; and, fourthly, that the alleged sale was not made in the y course of business, and that the document whereby the ok place was never registered as a bill of sale under the ns of "*The Instrument and Securities Act* 1864," and the 557, and was therefore wholly inoperative and invalid.

proceed to deal with the motion and the several appeals in er in which they have been presented to us and argued. The by the defendant for a new trial has been supported on six . These involve the consideration of one or more of the given by the jury to the thirteen questions submitted to the judge. 1st. It has been contended that the verdict, findings of the jury adverse to the defendant, are against e, and the weight of evidence. This contention was pointed ment to the special finding that the sale was a real sale, and inding, included in the verdict, that though Wilkinson and may have been dishonest in the part they took in the ion, the plaintiff Askew was honest, and did not know that re dishonest. We have intimated in the course of the argu- at the case could not, in our opinion, have been withdrawn e jury upon either of these grounds. There was sufficient e to show that the sale, apart from the question of the *des* of the parties to it, was a transaction which all the intended to carry into effect, that Askew was not a mere Wilkinson and Burkitt, and that in this sense the sale was and not a sham sale. The evidence as to the honesty or *des* of the plaintiff was much less satisfactory. His share ransaction was open to grave suspicion, and it called for, and

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we have no doubt that it received, due consideration from the jury; and we are not prepared to say that the jury could not as reasonable men have found that the plaintiff in this transaction was honest. He was suddenly tempted by an advantageous offer, which he had to accept or reject with little time for consideration, and although he must have known that he was required to pay for the stock less than it was actually worth, it is possible that he may have thought that the interests of the creditors would be safer if the business were in his hands as proprietor rather than in Wilkinson's. He had to pay the bills that were to be endorsed by Burkitt, and he may have believed that he would be able to pay them, as they became due, out of the proceeds of the business, and that Wilkinson would, like any other honest debtor, apply the proceeds of the bills as they were paid to satisfy the claims of his creditors. We do not say that we should have found as the jury have found on this question, but we cannot say that the jury have been clearly and unmistakeably wrong in their finding. Under this head it was further contended by Mr. Topp that there was no evidence to support the finding of the jury on the eleventh question, namely, that the plaintiff was not afforded by the defendant an opportunity for distinguishing and removing the goods bought subsequently to the purchase from Wilkinson, before the defendant sold them with the other goods. We are inclined to agree with this contention, but it is unnecessary to determine the question in view of our decision on the plaintiff's appeal, by which the question and the answer alike become immaterial.

2nd. It is said that the learned judge misdirected the jury with respect to the goods bought and paid for, since 24th December 1889, out of the proceeds of the goods bought by the plaintiff from Wilkinson on that day. This ground was given up as a ground of motion for a new trial, as the damages were assessed contingently at 1,000*l.* 3rd. This ground of motion for a new trial for misdirection fails for the same reason. The jury have assessed the plaintiff's damages contingently at 475*l.*, and the question is disposed of by our decision upon the defendant's and the plaintiff's appeals. 4th. This ground of motion for a new trial resolves itself into an objection to the sufficiency of the answer given by the jury to the following portion of the second question:—"Was

the alleged sale made by Wilkinson, as the plaintiff knew, at the time when Wilkinson was greatly indebted, and for the purpose and with the intention of defrauding, defeating, and delaying the creditors of Wilkinson?" Questions 1 and 3 have been answered. This part of question 2, it is said, has not been answered, and there has been, consequently, a mistrial. The question was put with reference to so much of the defence as rested on the Statute 13 Eliz., c. 5. By sec. 6 of that Act it is provided that the Act shall not extend to alienations of property made on good consideration and *bonâ fide* to any person not having notice of the fraud. It has been held, accordingly, that under this Act a mere intention to defraud, defeat, or delay, creditors, is not sufficient to avoid a sale of property made with such intention: *Wood* v. *Dixie* (*f*); *McNally* v. *Jack* (*g*); and, therefore, in a case under the Statute where the judge left it to the jury to say whether the bill of sale was a real *bonâ fide* transaction or a mere sham, the direction was held to be sufficient: *Darvill* v. *Terry* (*h*). In order to avoid the sale, it is necessary that good consideration shall not have been given, and that the person to whom the property is assigned shall not have received it *bonâ fide* and with notice of the fraud of the assignor. In the present case the jury have found that the contract was for valuable consideration, and they came into court and asked the judge the pertinent question, "If Askew was honest, but Wilkinson and Burkitt were dishonest, would that make it a bogus sale?" The judge properly answered, "No, if he were honest and did not know that they were dishonest." This question and answer, followed by a verdict in favour of the plaintiff, must be taken, we think, to supply the omission of the jury to return an answer to the portion of the second special question on which this ground of the motion rests. The jury have found, and as we have already held, on sufficient evidence, that Askew was not a party to the fraud, if any, intended by Wilkinson and Burkitt. It is evident that the jury before they returned their brief answer to questions 1, 2, and 3, found it necessary to consider, and did consider the question of Askew's *bona fides*, and that they determined it in his favour. That they intended their answer to include a finding on this point is further shown by the fact that the answer

(*f*) 7 Q.B. 892. (*g*) 11 V.L.R. 740. (*h*) 6 H. & N. 807, 30 L.J. (Ex.) 355

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was received without objection or comment by the judge an counsel on both sides, although objections were taken to of the other answers. 5th. The misdirection alleged as the ground of motion for new trial depends upon the result appeal upon the question whether the document of 24th Dec 1889 is a bill of sale or not. The 6th and last ground of n for new trial is the alleged misdirection of the judge in telli jury, after they had partially answered the questions submit them and were redirected as to damages, and before the finally delivered their verdict or findings, that they had no and were not at liberty to reconsider the whole of the que and their answers. The learned judge has informed us tha objection is founded on a mistake as to what actually oc at the trial, and that he merely advised the jury, in repl question put by one of them, not to reopen the conside of independent questions on which they had already arri a conclusion. We are of opinion, for the reasons above state the motion for a new trial has not been sustained on the grounds stated.

The defendant also appealed against the judgment primary judge, and moved that so much of the judgm adjudged that the plaintiff should recover against the def the sum of 1,475*l.*, and costs of the action, might be re and that judgment should be entered for the defendant costs of the action and of the appeal. This appeal rel the two sums of 1,000*l.* and 475*l.* referred to in the secon third grounds of the defendant's motion for a new trial. appeal fails as to both these sums by reason of our decisio the plaintiff's appeal. The question of commixture of goods and argued on this appeal also fails for the same reaso the appeal will be dismissed.

We now pass to the plaintiff's appeal. The document 24th December 1889, which was put in evidence and relied the plaintiff as a contract of sale of the goods, was in the fol terms :—

"Melbourne, 24th December,

"In consideration of the sum of 5,325*l.* to be paid to me as hereunder me by George Askew, of North Fitzroy, draper, I do hereby sell, assign, and tra him all my stock-in-trade, goods, fixtures, and chattels, in, upon, and ab

premises, known as Bradford House, 165 St. George's Road, North Fitzroy. Payments to be made as follows:—500*l.* cash; balance by approved bills in equal amounts, at 1, 2, 3, 4, 5, and 6 months, with interest at 6 per cent.

"A. H. WILKINSON.

Stamp 1d. 24/12/89 A. H. W.

Witness—M. J. S. Gair.

"Received from Mr. Askew the sum of 500*l.* above expressed to be paid.

"A. H. WILKINSON."

This document was undoubtedly the foundation of the plaintiff's title to the goods; without it there would have been no transaction between the parties. The plaintiff's possession, taken on the same day, was possession taken under the contract. It was conceded that, assuming (which, however, was not admitted, but denied) that this document was an assurance of personal chattels within the meaning of sec. 56 of "*The Instruments and Securities Statute* 1864," the facts did not bring the document within the consequences following under that section upon non-filing. But it was contended, for the defendant, that the document came within the provisions of sec. 1 of Act No. 557, and that, not having been filed, it was consequently inoperative, and had no validity in law or in equity. The primary judge, following an earlier decision of his in *McCarthy* v. *Nicholls* (i), agreed with this view, and he held that the plaintiff was not entitled to the 3,800*l.* which was found by the jury to be the value of the goods taken possession of by the plaintiff under the document. The plaintiff appeals from this decision, and it has been contended on his behalf that the Act No. 557 does not apply to an instrument like this, which is an absolute transfer, but only to such instruments of transfer which are made and given as securities for advances. In considering this important question, our attention has been properly invited to the general and the distinctive policy of the special provisions of the two enactments, Part VII., Bills of Sale, of "*The Instruments and Securities Statute* 1864," and Act No. 557. The first of these is a copy included in a Consolidating Act of an earlier Victorian Act, No. 141, "An Act to Prevent Frauds upon Creditors by Secret Bills of Sale of Personal Chattels," which was passed in the year 1862, and was itself in greater part a copy of the English Act, 17 & 18 Vic., c. 36. The chief purpose of this earliest English and Victorian legislation was

(i) 8 A.L.T. 180.

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undoubtedly to prevent the acquisition of false credit by who had parted absolutely or conditionally with their prope were allowed to remain in possession of it. The particular which this remedy was provided by the Legislature was the by which money-lenders by means of secret bills of sale obt title to, and a ready means of taking possession of, the pro their debtors, who were allowed to continue in apparent or os possession so long as they paid high interest on their debts particular class of their creditors. Part VII. of "*The Instr and Securities Statute* 1864," sec. 56, required that—

"Every bill of sale of personal chattels, made either absolutely or conditi subject or not subject to any trusts, and whereby the grantee or holder sh power either with or without notice, and either immediately after the m such bill of sale, or at any future time, to seize or take possession of any pro effects comprised in or made subject to such bill of sale,"

should be filed, together with the schedule or inventory, affidavit within ten days (extended to 31 days by Act N sec. 11) after the making or giving thereof. Sec. 63 enu instruments which are, and other instruments which a included in this definition of a bill of sale. A great many de have been given on the question continually arising as t instruments require registration under this enactment. Legislature appears to have intended to deal only with cases the grantor remained in possession of the goods. Accordi was observed in *Cohen* v. *McGee* (*k*) that the original A obviously never intended to apply to cases where the vendor with the possession of the goods. This decision has neve over-ruled, though the observation now cited from it was que in *McCarthy* v. *Nicholls* (*l*). On the other hand, it is cle the terms of the definition that absolute transfers in cases possession remains with the grantor, as well as transfers by mortgage or security, come within the definition of a "bill o in sec. 56. The later decisions go to show that the Co determining whether a document is or is not a bill of sale, wi at the real transaction between the parties, and ascertain the truth of the case, and will hold that the document, alt informal in character—*Glen* v. *Abbott* (*m*)—shall be deemed

(*k*) 4 V.L.R. (L.) 552. (*l*) 8 A.L.T. 180. (*m*) 6 V.L.R. (L.

bill of sale, and to require registration, if it is shown to be either a muniment of title to the goods, without which there would be no transaction between the parties, or to be the depository of the final intentions of the parties, and therefore necessary to be put in evidence in proof of the transaction: *Young and Others v. Mook Ah Meng* (*n*); *Yarnton* v. *Taylor* (*o*); and *Newlove* v. *Shrewsbury* (*p*).

The purpose of the Legislature in passing the original enactment was carried out by the provision that all bills of sale within sec. 56 should be filed within 10 days (now 31 days) after the making or giving thereof, and that if not so filed the bill of sale should be null and void to all intents and purposes whatsoever as against assignees in insolvency, trustees for the benefit of creditors, execution creditors, and officers executing process for them, so far as regards the property in, or right to possession of, the goods comprised therein, which at or after the time of the sequestration or assignment for creditors of the debtor's estate, or of the execution of process, and after the expiration of the period of 10 days (now 31 days), should be in the possession, or apparent possession, of the person making the bill of sale, or of the person against whom the process should have issued.

Such were the object and scope of the provisions of the original enactment contained in Part VII. of "*The Instruments and Securities Statute* 1864." The means of evading this law were soon discovered by money lenders, against whose operations the law was mainly directed. The practice grew up both in England —see *Marples* v. *Hartley* (*q*)—and in Victoria—see *Hedrich* v. *Commercial Bank* (*r*)—by which the bill of sale was constantly renewed before the time of protection had expired, thus avoiding the necessity of registration altogether, while preserving the secrecy of the transaction. This evasion had to be stopped, and it is necessary to bear in mind in considering the Act No. 557, passed in the year 1876, that it was with the object of stopping this evasion by amending the system of registration that this second Act was passed. Such being the object of the Act No. 557, it has

(*n*) 17 V.L.R. 140.
(*o*) 13 V.L.R. 903.
(*p*) 21 Q.B.D. 41.
(*q*) 1 B. & S. 1; 30 L.J. Q.B. 92.
(*r*) 1 A.J.R. 155.

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been argued for the plaintiff that the intention of the Legislature was limited to effecting that object, and that the provisions of the Act do not include absolute transfers, as was contended for the defendant, but apply only to transfers by way of mortgage or security. Sec. 1 of Act No. 557 is in the following terms:—

"No bill of sale executed after the coming into operation of this Act shall be operative, or have any validity at law or in equity, until the same shall be filed in manner provided by sec. 56 of '*The Instruments and Securities Statute* 1864,' and no such bill of sale shall be so filed unless notice of the intention to file the same be lodged at the office of the Registrar-General fourteen days before the filing thereof, and upon such lodgment there shall be paid to the Registrar-General a fee of one shilling."

The terms of this section are wide, and, taken by themselves, they appear to embrace every bill of sale within the definition of the previous Act, and must therefore include (except where, as is provided by sec. 63 of the original Act, there is something in the subject or context repugnant to such construction) bills of sale by way of absolute transfer. The notice of intention to file a bill of sale, provided for by this section, is a new feature of this Act. The form and contents of the notice are provided for in the second section and the first schedule. The form of notice distinctly points, in the column headed "Consideration," only to cases where the bill is given by way of security. The words of the notice itself, "to secure the debt or advances above mentioned," point to the same conclusion. As the notice is essential to the validity at law or in equity of any bill of sale executed after the coming into operation of the Act, and as the form of notice of intention to file an absolute transfer would involve a substantial alteration of the prescribed contents and form of the notice, it would be impossible to give a good notice of intention to file any bill of sale, except a bill of sale to secure a past debt or present or future advances. Sec. 3 provides for the keeping of a book by the Registrar-General, distinct from the books directed to be kept under the first Act, sec. 59, of all persons making or giving any bill of sale specified in such notice. Secs. 4 to 10 provide means by which creditors are enabled to prevent the filing of a bill of sale until their just claims at law or in equity are satisfied. Sec. 11 provides that the period of 10 days, within which bills of sale are by sec. 56 of "*The Instruments and Securities Statute* 1864" directed to be

filed, shall be extended to 31 days as to any bill of sale executed after the coming into operation of Act No. 557. This seems to apply to all bills of sale under both Acts. Sec. 13 is in the following terms :—

"Every bill of sale heretofore made or given otherwise than under or in execution of any process shall, at the expiration of twelve months after the coming into operation of this Act, and every bill of sale, otherwise than as aforesaid, which shall hereafter be made or given, shall, at the expiration of twelve months from the filing thereof, become null and void, unless within that time an affidavit shall be filed, made by the person or one of the persons entitled to the money secured thereby, or in the case of a corporation by its manager or other officer able to depose of his own knowledge as to the amount owing on the security thereof (such affidavit to be filed within seven days from the day of swearing the same), stating the amount owing on the security thereof at the date of swearing the affidavit; and, at the expiration of twelve months from the filing of any such affidavit, or of any subsequent affidavit, such bill of sale shall in like manner become null and void, unless a like affidavit is filed within such further period of twelve months showing the amount then owing on the security of such bill of sale."

It was argued by Mr. Isaacs that this section must be held to apply to bills of sale under the first Act, whether absolute or by way of security, as it excepts one, and only one, of the modes of absolute transfer mentioned in the first Act, namely, the transfer "under or in execution of any process," words which are evidently copied from sec. 56 of the first Act. This exception, it is said, would be unmeaning or unnecessary, if the words in this section, "every bill of sale," relate only to securities. But it had to be admitted by Mr. Isaacs that the enacting effect of this section is only applicable to bills of sale given by way of security, and that the first words of the section must be read, in respect to the enacting effect, as meaning "every bill of sale to secure the payment of money." It is perfectly plain that the requirements of this section could not be complied with by the grantee of an absolute bill of sale by which no money was secured, as, for example, a declaration of trust based on the consideration of natural love and affection. Such a bill of sale, if it comes within the section at all, would necessarily become null and void at the expiration of twelve months from the first filing. We cannot believe that it was the intention of the Legislature that such documents should be void for non-compliance with a statutory provision which it would be impossible to comply with. The new provision in sec. 15 of the Act, avoiding contracts of sale and of letting or hiring of chattels, unless both contracts are in

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writing and filed within a certain time, indirectly supports th
view of the general intention of this Act No. 557. Accord
the defendant's contention, an absolute transfer, where posses
given, must be filed, and notice of intention to file must be
whereas, in the case of a contract of sale and of letting or
where the goods may be retained by the vendor, or may be
back within an hour after they are sold, all that the Act requ
filing without notice. Sec. 17 provides that the Act No. 55
be construed with, and is part of, Part VIII. of "*The Instru
and Securities Statute* 1864." If these two Acts are to be r
one, as they now appear in the Consolidating Act (the *Instru
and Securities Act* 1890), the difficulty is raised that we h
put a limitation upon the words "bill of sale" in one part
Act which we do not put upon the same words in the other
of it. It is plain that sec. 13 of Act No. 557 must be limi
this way, and a reference to the first schedule of the later A
the two secs. 2 and 13, as well as to the distinct historical or
the two parts of what must be read as one Act, seems to us to
that the Legislature intended that the same limitation sho
put upon all the sections, except sec. 11 of the one Act, whi
comprised in, or taken from, the Act No. 557. This view
sec. 56 of the earlier Act in operation as regards bills of sale
than those given by way of security; whereas, if we were to
the defendant's view, it would render the latter half of se
beginning with the word "otherwise," mere surplusage.

The defendant's contention as to the intention of the Legis
in passing the Act No. 557 was that the creditors were to b
tected from any transfer by a debtor of his goods, otherwis
in specially excepted cases, by giving them an opportun
stopping such transfer. We cannot believe that such wa
intention, for, in addition to reasons already mentioned, it is
that such intention, if it existed, has not been carried out.
is nothing according to this view to hinder the debtor from p
with his goods by a verbal contract, and it would be a s
result if the Legislature hindered written transfers of pr
while it allowed verbal transfers to go untrammelled. The
dant's contention would also undoubtedly interfere with ever
transactions, unless in the ordinary course of business, as it

require the filing of a bill of sale, of every contract of sale, even though followed by immediate possession and payment of the purchase money. The plaintiff's contention, on the other hand, as to the intention of the Legislature, disturbs fewer transactions, while it protects creditors from all transfers of property where, as a rule, possession would remain in the transferror. Except in the case of a pledge, which is admittedly not within the Act, it is not easy to conceive a case in which possession would not remain in the transferror where the transfer is given by way of security. It is more reasonable, in our opinion, to conclude that what the Legislature intended to prevent was the constant renewal of securities by way of a fresh bill of sale, and that it did not intend to interfere with the very common case of absolute transfers. We are of opinion, therefore, that the Act No. 557 does indirectly what the later English Act of 1882 has done expressly, when it excludes from its application all bills of sale other than those given by way of security. The motion by defendant for a new trial, and the appeal by the defendant from the judgment below, will be dismissed, with costs. The plaintiff's appeal will be allowed, with costs; and the judgment appealed from will be varied by increasing the amount of damages awarded by 3,800*l.*

Solicitors for plaintiff: *Brahe & Gair.*
Solicitors for defendant: *Braham & Pirani.*

A. F. M.

1892
April 11, 25.

A'Beckett, J.

GREGORY *v.* POOLE.

Real Property Act **1890 (*No.* 1136), *s.* 19—*Statute of Limitations*—*Intestacy*—*Death before Intestates Act* 1864 (*No.* 230)—*Rule to administer goods*—*Administrator taking possession of land*—*Trustee for heir-at-law*—*Land remaining unoccupied.***

If an administrator, who has taken out a rule to administer the goods of an intestate dying before the Intestate Act 1864 (No. 230), leaving an infant heir, has entered into possession of the real estate of the intestate, he must be taken as having done so as trustee for the infant, so as not to set the *Statute of Limitations* running against him until such heir's death, when, by virtue of sec. 19 of the *Real Property Act* 1890 (No. 1136), it begins to run.

The *Statute of Limitations* does not commence to run against the owner of land merely because he has not taken possession thereof, if the land remains unoccupied.

ACTION for the recovery of land and mesne profits. Besides the defence of possession, the defendant, George Poole, set up the *Statute of Limitations*.

Thomas Gregory was the owner of the land in question in 1858 and up to his disappearance in 1859. About the 9th November 1859, he and the younger of his two children left French Island for the main land, and were never heard of again. He was intestate, and his father-in-law took out a rule to administer his goods, and sold this land to one Ward, who in 1875 sold to the defendant, George Poole. Thomas Gregory's elder daughter, Emma, died in 1866, and his brother, as heir-at-law of Thomas Gregory and of his daughter Emma, now sued Poole, and his servant John Saunders who was in possession of the land, for the recovery of the land, and for mesne profits.

Higgins and *Vasey* for the plaintiff.

Madden and *Power* for the defendant, Poole.

Cur. adv. vult.

April 25.

A'BECKETT, J. In this case the only fact which admitted of doubt upon the evidence, was the date of the death of Thomas Gregory, from whom the plaintiff claimed title by descent. I accept 9th November 1859 as the true date. It was fixed as the date of death at a time when no one had an interest in misrepresenting the date, and when calculations could be made by which it could be

correctly ascertained. One of the witnesses, Mrs. Bates, swears that this was the day, and though she cannot now explain the reasons which led her to arrive at it, I accept her statement on the subject. On this finding of fact I have to deal with the defence that the plaintiff's title is barred by the *Statute of Limitations*. On the death of Thomas Gregory intestate, the land, the subject of this action, descended to his infant child, Emma Gregory, who died on the 14th of May 1866. It does not appear that any stranger entered on the land in her lifetime. If the administrator of her father had entered, I think he should be regarded as having done so as her trustee so as not to set the *Statute of Limitations* running against her: See *Foley* v. *Egan* (*a*). The mere fact that the infant did not take possession, and that the land was unoccupied during her lifetime, would not set the Statute running: See Act No. 873, sec. 1, now part of sec. 19 of Act No. 1136; and independently of this provision: *Trustees, etc., Co.* v. *Short* (*b*). I therefore think that the Statute began to run against the plaintiff only from the date of the death of Emma Gregory, under sec. 19 of Act No. 1136. This was in 1866; but the plaintiff was entitled to the protection of sec. 31, being under the disability of absence from Victoria allowed for under that section. This disability has never been removed, but notwithstanding his disability he would, under sec. 32, lose his right, unless he brought his action within 30 years from the right accruing. He is well within that time if he claims the estate of Emma Gregory. If he is to be regarded as claiming the estate, not of Emma but of Thomas Gregory, the last purchaser, he is only just within time. He would be excluded if time had begun to run against Emma, and he regarded as claiming under her, were a succession of disabilities not being allowed for. The plaintiff sues for mesne profits, and evidence has been given on both sides as to annual value. I allow 20*l.* a year as the annual value. I direct that the plaintiff recover possession with 120*l.* and costs, to be paid by the defendant, George Poole.

Solicitors for plaintiff: *McCutcheon & Bruce.*
Solicitor for defendant: *F. J. S. Stephen.*

A. J. A.

(*a*) 17 V.L.R. 340.

(*b*) 13 App. Cas. 793.

F.C.

1892
April 22.

PRESIDENT, ETC., SHIRE OF CAULFIELD *v.* EVANS.

"Supreme Court Act 1891" (*No.* 1208), *s.* 5 (1)—*Jurisdiction of single judge to hear orders to review—Local Government Act* 1890 (*No.* 1112), *s.* 293—"*Local Government Act* 1891" (*No.* 1243), *s.* 66—*Rates—Recovery of arrears of rates—Demand of payment of rates.*

Orders to review decision of justices should be made returnable before the Full Court, inasmuch as sec. 5 (1) of Act No. 1208, giving jurisdiction to a single judge to hear orders to review, applies only to orders of courts of petty sessions.

A demand was made upon the defendant by a municipal council, on the 21st March 1891, for payment of—

"Rates for year ending September 1891 ...	35*l.*	0*s.*	0*d.*
Arrears	108*l.*	17*s.*	6*d.*
	143*l.*	17*s.*	6*d.*"

The arrears included rates for the years 1888, 1889, and 1890.

Held, that as the demand was made for the payment of a bulk sum, including a rate for a year which could not be recoverable either under sec. 293 of Act No. 1112 or under sec. 66 of Act No. 1243, the demand was bad in respect of all the rates in arrear.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of justices, by which decision the defendant, George Evans, was ordered to pay 254*l.* 6*s.* 3*d.* for rates due to the Shire of Caulfield, the shire being the complainant. The rates sued for included rates for the year 1888, rates made on the 21st March 1889, rates made on the 4th December 1889, and rates made on the 14th January 1891. The notice of demand served on the defendant was in the following form:—

"I hereby demand payment of municipal rates amounting to 143*l.* 17*s.* 6*d.* (particulars below), due on property situated in Grange Road, of which you appear to be the owner . . . .

General rate, year ending 30th September 1891 ...	35*l.*	0*s.*	0*d.*
Arrears	108*l.*	17*s.*	6*d.*
	143*l.*	17*s.*	6*d.*"

Another notice similar in form, claiming rates for 110*l.* 8*s.* 9*d.* on another property, was also served on the defendant, the particulars thereof being—

"General rate, year ending 30th September 1891 ...	27*l.*	6*s.*	3*d.*
Arrears	83*l.*	2*s.*	6*d.*
	110*l.*	8*s.*	9*d.*"

Both notices were dated 23rd March 1891.

The justices having made the order for the full amount claimed, the defendant obtained an order *nisi* to review such decision upon the following grounds :—(1.) That upon the hearing of such complaint there was no evidence of any sufficient demand, under the Local Government Acts, upon the said George Evans for payment of the rates sued for. (2.) That as to the 1888, 1889, and 1890 rates sued for, there was no evidence of any demand upon the persons respectively rated therefor to pay the same.

The order *nisi* called upon the complainants to show cause "to the Supreme Court on Friday, 25th March 1892, at two o'clock in the afternoon, etc." The parties appeared in accordance with such notice before His Honor Mr. Justice Williams, who was the judge appointed for hearing orders to review for the month of April. Objection was taken by counsel for the complainants that this being an order to review the decision of justices, it should have been made returnable before the Full Court, inasmuch as the "*Supreme Court Act* 1891" (No. 1208), sec. 5 (1), only gave power to a single judge to hear orders to review the decisions of the courts of petty sessions. His Honor held the objection to be good, but upon the application of counsel for the defendant, directed an extension of time for the return of the order *nisi*. The order came on for hearing now before the Full Court.

Mitchell to show cause—This order was made returnable before the Supreme Court, and it came on before Williams, J., but the order appealed from being a decision of justices, sitting as justices, the "*Supreme Court Act* 1891" (No. 1208), which gives power to a single judge of the Supreme Court to hear orders to review decisions of the court of petty sessions, did not apply, and the learned judge so held. If the learned judge had no jurisdiction to entertain the hearing of the order *nisi*, he had no power to enlarge the return, and so give the defendant an opportunity of coming to the Full Court. If there was power to extend the time, the application for such extension should have been made before the original time had expired. The complainants have lodged an appeal against the order of Williams, J., and I now apply that that appeal should be heard first.

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Irvine in support of the order—The order was returnable before "the Supreme Court," and it is the mistake of the officer of the Court that it was set down in the list before Williams, J. "Supreme Court" means the Full Court: *Box* v. *Attfield* (*a*). It is admitted that the order could not be entertained by Williams, J., under the provisions of sec. 5 of Act No. 1208.

Mitchell in reply—The order is taken out by the defendant, and is made returnable at 2 p.m., and that clearly indicates that the mistake was that of the party and not of the officer.

[HOOD, J. It was sent by mistake to the wrong Court. It may be brought back to the proper Court.]

Yes, but the return day is wrong.

[A'BECKETT, J. The Court having jurisdiction to deal with it cannot be deprived of that jurisdiction because the prothonotary has put the case in the wrong list. The jurisdiction of the Court is independent of the printed list.]

It was made, advisedly, returnable before the Supreme Court, and "the Supreme Court" is not "the Full Court" for this purpose.

[HIGINBOTHAM, C.J. "The Full Court" includes "the Supreme Court." "The Supreme Court" may be something less than "the Full Court," but "the Full Court" includes "the Supreme Court" more fully constituted.]

HIGINBOTHAM, C.J. We hold that the Court has jurisdiction to hear this order, and we will deal with it on its merits.

Mitchell to show cause—The demand made upon the defendant was sufficient within the meaning of secs. 288 and 293 of Act. No. 1112.

[HIGINBOTHAM, C.J. By sec. 65 of the Amending Act No. 1243, the demand "shall contain an intimation in the words, or to the effect, in the second schedule."]

The demand was made in March 1891, before the passing of that Act, so that that section could not apply. Under sec. 293 of

(*a*) 12 V.L.R. 574.

o. 1112, where the occupier has not paid the rates, they may overed within twelve months after the making of the rates the owner. By sec. 66 of Act No. 1243, the words "'three are to be substituted for the words 'twelve months.'"

HOOD, J. No matter what construction you give to sec. 66 annot recover the arrears of rates for 1888.]

, apparently not; the complainant cannot go back beyond The second rate was made in March 1889. The defendant e notice, and there is no objection taken; the sum demanded roperly due. Sec. 293 does not prescribe any particular of demand; it merely provides (reading sec. 66 of Act 243 into it) that if the rates remain unpaid for three years the l may within that period demand payment of the same. nd was undoubtedly made.

'BECKETT, J. You have admittedly demanded something vas not recoverable, namely, the rates for 1888; surely the d must be for something that is payable.]

he terms of sec. 293 are very general.

HIGINBOTHAM, C.J. The section seems to contemplate a te demand for the several rates.]

he demand is made for payment of a certain sum, not for ent of a certain rate.

'BECKETT, J. The demand must be for "the amount of such ; if a demand is made for a larger sum that is not a good nd.]

l the provisions of sec. 293 have been complied with. The hat a demand has been made for one year more than the ainants were entitled to does not make the whole demand

vine to move the order absolute—The rates were made in ary 1888, March 1889, and December 1889; the demand nade of a bulk sum called "arrears" in March 1891. The No. 1243 came into force in December 1891, and therefore it t affect a demand made prior to December 1891, and it is trospective to make the three years date back so as to enable omplainants to recover something which they could not have ed before the passing of that Act. If the demand was bad at

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the time it was given the new Act cannot make it good. section puts the words "three years" in, in order to p machinery for carrying out the intention of the Legislatu indicated in sec. 64 of that Act; sec. 66 is merely in aid of se The Court will not construe an Act to give it a retrospective unless the intention of the Legislature is very clear.

[HIGINBOTHAM, C.J. The solution seems to be to read sec as containing the words "three years," and reading it as h been passed with those words in it.]

Even if that be so then the complainants must show tha demand was good at the time it was given. The demand wa at the time it was given, inasmuch as it claimed money admittedly could not be claimed; and, as the whole demand one bulk sum, the defendant had no opportunity of knowing amount really was due. There must be a separate deman each rate. I admit that the demand for the rates of 1891 c be objected to.

Mitchell in reply.

HIGINBOTHAM, C.J., delivered the judgment of the [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.] This orde granted upon two grounds. With respect to the second gr which was the only point argued, relating to the 1888, 1889 1890 rates sued for, we think that the objections raised b defendant are fatal. The demand was made before the new No. 1243 came into force. We think that the effect of sec. this new Act amounts to this—that the words "three years to be inserted in sec. 293 of the *Local Government Act* 18 lieu of the words "twelve months." If we read sec. 293 those words inserted therein, and apply that section to the fa this case, no demand has been made under sec. 293 for the rec of the arrears of rates for these three years. The demand wa a good demand. On the other hand, if the section be read original form, and "twelve months" demand should be made no such demand has been made within twelve months; the t months were allowed to lapse before the demand was made. T fore, in either view of the case the objection has been susta

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and must be given effect to. The case has come before this Court in a peculiar way, and the defendant has been to a certain extent to blame, and the order to review will be made absolute, without costs. The order made will be varied by reducing the amount to that of the rates for the one year ending September 1891.

Order absolute, without costs.

Solicitors for complainant: *Fink, Best, & P. D. Phillips.*
Solicitors for defendant: *J. M. Smith, Emmerton & Johnson.*

W. H. M.

CARROLL *v.* WOOLDRIDGE AND OTHERS.

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Nov. 11, 13.

Hodges, J.

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April 22, 25.

The Mines Act 1890 (*No.* 1120), *ss.* 301, 303—*Mining on private property—Lease from owner of land—Lease from Crown—Right of owner under original lease—Trespass.*

An owner of land granted a lease in 1881, for mining purposes, for a period of twenty-one years, prior to the passing of "*The Mining on Private Property Act* 1884," No. 796 (the *Mines Act* 1890, No. 1120); the lessee, in 1885, obtained a Crown lease, under Act 796, for the term of eleven years. By sec. 11 of the Act No. 796, it is provided that the granting of the Crown lease "shall not as between the parties to any such lease" (referring to private leases not under the Act) "interfere with any of the provisions of the said lease." The lessee committed breaches of covenants contained in the lease of 1881, and the owner therefore determined that lease and re-entered pursuant to the powers therein given. The lessee subsequently, during the existence of the Crown lease, came upon the land and removed certain machinery: the owner then brought an action for trespass against the lessee.

Held, affirming judgment of Hodges, J., that the plaintiff was entitled to recover, notwithstanding that the term of the Crown lease had not expired.

APPEAL from judgment.

This was an action for trespass and for damages for pulling down and removing certain machinery on the plaintiff's land. The plaintiff claimed to be proprietor in possession of an estate of fee simple in the land. The defendants denied the allegations of fact contained in the claim, and alleged that they were the transferees of a mining lease, granted by the Crown under the provisions of "*The Mining on Private Property Act* 1884," to the Princess United Mining Co. for the term of eleven years, from the 13th July 1885, and if they did enter the land (which they denied), they

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entered it by virtue and under the powers and rights of t
mining lease. The reply of the plaintiff alleged that one
terms of the mining lease under the Act was that the gra
demise should not as between the parties thereto interfere w
lease or agreement granted by the owner of the land to the l
and that the rights of the parties thereto must be determi
the conditions of such lease or agreement, and not otherwise
one of the terms of the lease or agreement was, that if the
should suspend mining operations for the space of six mo
any one time, the lessor should be entitled to enter up
premises and take possession of the same; then there fo
averment of a breach of this covenant, and that the less
re-entered and determined the lease. It appeared that the pl
the owner of the land, had, by a lease dated 26th February
leased the land to the Princess United Mining Co. f
term of twenty-one years. Defendants derived their title t
the Princess United Mining Co. The defendants, after the p
had given notice of determination of the original lease, re
certain machinery which had been erected by the Princess
Mining Co. The further material facts are set out in the jud
of Hodges, J.

Madden and *Barrett* for the plaintiff.

Finlayson and *Mitchell* for the defendants.

HODGES, J. The plaintiff, the owner in fee, in this actio
to recover damages from the defendants for trespass by the
dants, and for damage done on the 26th and 27th of Sept
1890, to the plaintiff's land. The defendants in answer
First, we were at that time in possession of this land un
unexpired and undetermined term, and so we had a right
time to be on the land; and secondly, even if the term was
determined, we had the right to go on the land and remo
tenant's fixtures; and the question is whether they have su
either of those defences. It appears that the plaintiff o
February, 1881, leased this ground to the Princess United
Co. No Liability, for the purpose of mining upon it for a

of twenty-one years; and while that agreement or lease, or whatever it may be called, was in force, "*The Mining on Private Property Act* 1884" came into force. By sec. 4 of that Act it was provided that—

"Any lease or agreement existing on the first of August one thousand eight hundred and eighty-four and purporting to give the right to mine in or on private land and made between the owner of such private land and any other person may be registered as hereinafter provided by any of the parties thereto or the assignees thereof."

Now that section applies to this particular document, because when that Act came into operation this agreement or lease purporting to give a right to mine on private land was in force. Then that section provides that the lease having been registered, application may be made for a mining lease. Application appears to have been made for a mining lease, and on the 13th July, 1885, a Crown lease was issued to the Princess United Mining Co. No Liability, for a period of eleven years, giving a right to mine subject to a variety of covenants and other provisions contained in it. The contention of the defendants is that that mining lease gave them a right to remain on and work this property, and that their right to remain there could be determined and determined only by the Crown, and that by reason of the Act providing for mining on private property, no person but the Crown could determine their term or put an end to their right to remain and mine on this ground, and they say that the Crown has not determined it, and that therefore they have got an unexpired lease—(I should add that they have got a certificate of title for this lease). So I have to determine whether or not any person other than the Crown can take any steps to determine the right of the defendant company, who are the assignees of this mining lease, the other defendants acting under their authority. The certificate of title put in is simply a certificate which gives them the land on the terms and conditions contained in the mining lease, so that I need not trouble about the certificate of title. I go to the mining lease. It is said that this mining lease gives or creates an estate for the eleven years, and that during that period the owner of the land has no remedy whatever except in so far as he can set the Crown in motion, or possibly may sue for breaches of the agreement, but

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that is his only remedy. That is said on the authority of sec. 9 of "*The Mining on Private Property Act* 1884," which provides in the latter part of the section that when these agreements are registered, and a mining lease executed,

"Such lease or agreement may with regard to all reservations covenants and provisions therein contained and all matters arising under it with regard to the rights derived through it of all parties claiming a right to mine on such private land be enforced on and from the date of such mining lease in the same manner as if it had been an agreement or contract made under the provisions of this Act."

Then it is said that sec. 38 of the Act shows that the Attorney-General, or someone on behalf of Her Majesty, can take proceedings to eject, where there has been any breach of the provisions of the lease. That section provides:—

"In case any mining lease granted under the authority of this Act is or is liable to be forfeited or declared void or determined by any breach of covenant or condition or otherwise or in case the term thereby granted has expired possession of the mines demised shall and may be recovered on behalf of Her Majesty in such manner as may be provided by any of the conditions of such mining lease or if there be no such conditions it shall be lawful for the Attorney-General on behalf of Her Majesty to bring a suit in the Court of Mines . . . to recover possession of such land,"

and they say that that is the remedy, and the only remedy, given by the Act; and, consequently, that the Crown, and it only, can take proceedings. On the other hand, secs. 10, 11, 12, and 13 of this Act are important on this aspect of the question, and it is not to be lost sight of that the Statute itself provides that these leases are not to vary contracts as between the parties to them, and the second regulation under the Statute provides that:—

"Nothing in these regulations contained shall be applied so as to interfere (as between the parties to any lease or agreement existing on the first day of August one thousand eight hundred and eighty-four) with any such lease or agreement and subject as aforesaid all these regulations except the regulations numbered seven and twenty-five and except also so far as they relate to the ascertaining and the payment of the amount of any compensation shall extend and apply to all persons who desire to mine on any lands of which they themselves are owners and occupiers and to all persons mining under any lease or agreement existing on the first day of August one thousand eight hundred and eighty-four."

Now, if the contention of the defendants is correct, the provisions of the agreement between the parties have been seriously affected, and all the provisions entitling a party to take possession for breach of covenant have been annihilated, and are gone altogether. I think that an examination of the Crown lease

itself would show that the Crown would not be entitled to claim possession for breach of the covenants in the agreements. The Crown lease itself says :—

"That in consideration of the rent hereinafter reserved and of the covenants and provisoes hereinafter contained Her Majesty does by these presents grant and devise unto the lessee etc. all these mines of gold and silver etc. for the purpose of mining for working and winning the said gold etc. To hold the said mine land and premises (subject nevertheless to such rights interests and authorities as may be lawfully subsisting therein at the date of these presents)."

So that this grant itself, in express terms, provides that it is not to interfere with that agreement. Then the proviso for re-entry is in these words :—

"If the lessee his executors administrators or transferrees shall at any time during the said term fail to use such land mine and premises *bonâ fide* for the purpose for which it has been demised etc. or if and whenever there shall be a breach of or non-compliance with the covenants and provisoes herein contained by the lessee etc. the interest of the lessee etc. under these presents shall cease and determine both at law and in equity and it shall be lawful for Her Majesty her heirs and successors or her or their agents or officers or for any bailiff of Crown lands without any previous demand whatsoever to enter forthwith unto and upon the said land etc."

So that what a person has to do is to perform the covenants and provisoes contained in this lease, and if he does so then the Crown has no right to re-enter. It is true that it says that it shall not interfere with the agreement, but it does not provide that for any breach of the agreement between the parties the Crown may re-enter. There is no proviso securing their performance, so the lessees could disregard all the terms of their lease from the plaintiff, and there is nothing in this lease which would authorise the Crown to re-enter or authorise the plaintiff to set the Crown in motion. If the defendants' contention were correct, the agreement between the plaintiff and the Princess United Mining Co. would not only be affected but the more important provisions of it would be annihilated by the construction which they would give to the Crown grant, and the construction which they give to the other portions of this Act. But, in my opinion, the remedy of either party on his agreement remains as before, and though it seems somewhat anomalous that there should be two distinct parties entitled to turn the lessee out and re-enter, it is no more than exists in the case of an under-lease, except that the lessee under an under-lease is in a more unfortunate position, as he is liable to be turned out of

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possession, not only for his own breaches but also for those committed by the lessor. Here the lessee is not liable to be turned out for his lessor's breaches, but he has two sets of covenants to comply with. If he breaks one, the owner may enforce his right of re-entry, and, if he breaks the other set, the Crown may interfere. I entertain very little doubt that the Legislature did not intend to take away the owner's rights under his agreement, but rather meant to preserve agreements between the parties, and it would be idle to talk of preserving them if there was no remedy for enforcing them. I am, therefore, of opinion that this contention of the defendant is not well founded.

Then it is said that this agreement between the plaintiff and the Princess United Mining Co. has not been proved to have been registered under the Act. I do not know whether that would have been any answer, but this Crown lease could only have been properly granted if it had been registered, and I think the maxim *omnia præsumuntur rite esse acta* would apply. But in this case, whether it had been registered or not, this lease is expressly made with that liability imposed upon them. Their lease, upon which they rely, expressly leaves them under an obligation to perform those covenants.

The second answer was that, even if this lease has been determined, the defendants had a right to go on the land for the purpose of removing tenants' fixtures. The difficulty there is a defect in proof. They have not proved their title to those fixtures. Before going further, I think I should say that it is not disputed between the parties, but that the agreement between the plaintiff and the Princess United Mining Co. has been broken; so that the plaintiff's right of entry had accrued if the plaintiff had that right under the agreement. The defendants' evidence of title started with the evidence of a witness who stated that there had been a lease from Owen Thomas to the Countess Mining Co., and that this plant was erected by the Countess Mining Co., and that they had bought it from the Countess Mining Co.; but I do not feel by any means satisfied with the proof on this part of the case. I do not doubt that some person was in some way or other told off to go to this building and take possession of this plant, but as to how he took possession, if he ever did, or as to what was done, I am

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ar. Nor do I feel clear that the Countess Mining Co. were re trespassers, and if they put up the things when they were respassers, they would have no tenants' fixtures to convey. t feel clear about the defendants' evidence as to the fixtures. o defences, in my opinion, have broken down. On the n of damages I am disposed to take the lowest amount ned by the witness Curtoys, which was 400*l.* This is more than the amount fixed by defendants' witnesses, but it is a fair assessment. Judgment will be for the plaintiff sum of 400*l.*, with costs.

A. J. A.

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m this judgment the defendants now appealed.

layson and *Mitchell* for the appellants—When the lease was by the Crown the lease from the owner was absolutely ined, and no longer existed for any purpose whatsoever. se from the Crown is limited under the Act to eleven years, erefore the right of mining upon the land being fixed for years and not for twenty-one years, as provided by the lease e owner, the terms of this latter lease are changed and the self is changed. It was held, formerly, that a lease to mine ate lands was illegal: *Clarke* v. *Pitcher* (*a*); *The Bonshaw ld Gold Mining Co.* v. *Prince of Wales Co.* (*b*); *Attorney-l* v. *Lansell* (*c*). Then in 1884 this *Mining on Private y Act* was passed, which gave the Crown the extraordinary of granting a mining lease without the consent of the in fee of the land. At that time there were numbers of leases existing, and by sec. 4 of the Act No. 796, on was made as to these leases, and the owner of the land wer given to him to do certain things in respect thereto, no steps were taken under that section, then the old lease be deemed to be at an end, and could not be enforced. lease was determined by the granting of the second lease by wn, and the Legislature, knowing this, provided by sec. 11 for enforcing any rights already accrued under the old lease.

9 V.L.R. (L.) 128. (*b*) 5 W. W. & A'B. (E.) 140.

(*c*) 7 V.L.R. (E.) 59.

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Sec. 11 was not intended to keep alive the old lease for all purposes. Sec. 89 empowers the Governor in Council to allow the owner to re-enter.

[A'BECKETT, J. The Crown has no estate in the land at all.]

The estate remains in the Crown until the expiration of the term, and sec. 33 provides that the land shall, upon certain events taking place, be re-conveyed to the owner. That shows that the estate has gone out of the owner. Sec. 38 gives power to the Crown to recover the land in an action for ejectment.

[HIGINBOTHAM, C.J. It is admitted by the title of the Act itself that the land is not in the Crown, it is called "private property."]

The Act was passed for the purpose of demising the private property. The parties may make any agreement they like as to compensation, but the Crown is the only person who can make terms as to the working of the mine. Whatever may be the right of entry under the original lease, it cannot have the effect of terminating the right the defendants have to be there under the Crown lease. The action is one for trespass, and if the defendants had a right to be on the land by virtue of the Crown lease, they cannot be called trespassers. The owner of the land has no power to determine the lease from the Crown, and if he has no power so to do, then the defendants were rightly on the land. The defendants may, perhaps, be liable for breach of covenant, and the plaintiff might have the right to recover in another form of action, but he cannot sue in this form.

Madden and *Barrett*, for the respondent, were not called upon.

PER CURIAM [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. We are of opinion that the judgment of the learned primary judge was right, and that the appeal must be dismissed.

Appeal dismissed, with costs.

Solicitors for appellants: *Cuthbert, Hamilton & Wynne.*
Solicitor for the respondent: *Gill.*

W. H. M.

BOWEN *v.* WRATTEN.

1892
May 10, 19.

Hood, J.

"The Land Act 1884" (*No.* 812), *ss.* 32, 38 (2) *and* 53—*Lease of grazing area—Assignment of lease subject to consent of Board of Land and Works—Written consent—Consent previous to registration—Illegality.*

The plaintiff, who was the holder of a lease of land under sec. 32 of "*The Land Act* 1884" (No. 812), containing covenants in accordance with the regulations, including a covenant against assigning without the previous consent of the Board of Land and Works signified in writing, entered into a written agreement to sell the same to the defendant "subject to the consent of the Lands Department," and on the same day both signed an application to the Board of Land and Works for its sanction in writing to the transfer. The application was forwarded to the Lands Department and subsequently the Board of Land and Works gave its consent in writing, and an endorsement was placed on the lease by the Office of Titles stating that the defendant was then the registered proprietor of the lease, but the Lands Department did not in writing give its consent.

Held, that as a fact, so far as the Lands Department had anything to do with the matter, it had consented, and that the want of a written consent could be and was waived, as the transaction was completed through and by the various departments acting for the Crown with full knowledge, and that so far as the defendant was concerned this would be an answer even if there were no written consent.

Held also, that by the term "Lands Department," the parties meant to signify the officials having control of these matters, and under that name the Board of Land and Works, the only body whose consent was material, was meant.

Held further, that even if the consent of the Lands Department were required, that consent might be given by the Board of Land and Works, as by sec. 11 of the *Public Works Act* 1890 all matters concerning public lands are to be considered by that Board.

Held further, that as the assignment was of no effect till it was registered, and the registration was after the consent of the Board of Land and Works, there was no breach of the covenants and no illegality in contravention of sec. 38, sub-sec. 2, and of the regulations—that the transfer of the lease which was effected by registration was perfectly legal, and there was nothing wrong in agreeing to sign or in signing a form of transfer prior to registration and subject to consent.

ACTION by James Bowen against George Wratten for damages for breach of an agreement. The agreement was as follows:—

"8th April, 1891.

"Memorandum of Agreement made and entered into this day between James Bowen, of Hawthorn, and George Wratten, of Silver Street, Malvern, whereby the said James Bowen agrees to transfer 861 acres of land held under lease sec. 38, sub-sec. 2, of "*The Land Act* 1884," being in the County of Buln Buln, Parish of Budgeree, allotment 52, subject to the consent of the Lands Department, for the sum of 10*s.* 6*d.* per acre, or 452*l.* 0*s.* 6*d.* the lot, payable by George Wratten to James Bowen as soon as transfer is completed."

The lease from the Crown held by Bowen contained covenants in accordance with the regulations of the Governor in Council

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made under the Act against the plaintiff's assigning, sub-lett sub-dividing, or parting with the possession of the land, witho previous consent of the Board of Land and Works signi writing.

The pleadings, facts, and arguments, sufficiently appear judgment.

Forlonge and *R. W. Smith* for the plaintiff.

Isaacs and *Hayes* for the defendant.

Cur. adv.

May 19.

HOOD, J. The plaintiff, James Bowen, was the lesse the Crown of certain lands under the provisions of sec. "*The Land Act* 1884." By an agreement in writing, 8th April, 1891, he agreed to transfer those lands to the defe George Wratten, for the sum of 452*l.* 0*s.* 6*d.*, payable as the transfer was completed, subject to the consent of the Department, and on the same day the plaintiff and the def signed an application to the Board of Land and Works sanction in writing to the transfer. That application was for to the Lands Department, and in August 1891 the consent Board of Land and Works was given in writing, such consen gazetted on 21st August. On the 11th August an endor was placed upon the plaintiff's lease by the Office of Titles, that the defendant was then the registered proprietor of the

In July, however, the defendant had repudiated the cont the ground that he had been induced to make it by the pla misrepresentations. The plaintiff now sues to recover the purchase money, and to this the defendant pleaded several de The first was a denial of the agreement, but this was a mer He next alleged misrepresentation, but on this I found th against him. There then remained several legal objectio was contended that the plaintiff had not performed his por the agreement, inasmuch as he had not procured the consen Lands Department to the transfer or to the agreement. objection is based upon the words in the agreement, mal subject to the consent of the Lands Department. So far as

a question of fact, and so far as the Lands Department had anything to do with the matter, I have no doubt that the department did consent, and I so find.

It was next urged that the plaintiff was bound to get a consent in writing. So far as the Crown was concerned, I should say that the want of a written consent could be, and was, waived, as the transaction was completed through and by the various departments acting for the Crown with full knowledge. The agreement does not expressly require a written consent, and inasmuch as the real object of this condition was to assure the concurrence of the plaintiff's landlord and of the Board of Land and Works, so as to obtain a legal transfer of the land to the defendant, I should also be of opinion that the waiver of a written consent by the Crown and its departments would be an answer, even so far as the defendant is concerned. So that even if there had been no written consent, I should be against the defendant on this point, and would have amended the pleadings as might be necessary. But I think that the plaintiff did prove a written consent within the meaning of the agreement, for he proved the written consent of the Board of Land and Works, and that is what I consider was really meant. The plaintiff's lease provides for the consent of the Board of Land and Works being obtained, as both parties knew, while the consent of the Lands Department, as a separate body from the Board, was utterly immaterial. The expression was used in a loose way to signify the officials having control of these matters, and under that name the Board of Land and Works was, I think, meant, it being the only body whose consent was material. "Lands Department" is not, in my opinion, an unnatural expression to be used colloquially to signify the Board of Land and Works in these matters. Moreover, even if the consent of the Lands Department were required, that consent might well be given by the Board of Land and Works, as by sec. 11 of the *Public Works Act* 1890 all matters concerning public lands are to be considered by that Board. I think, therefore, that the consent was sufficient.

A further objection was taken to this consent. It was pointed out that the lease and the regulations required that the consent should be obtained *before* any assignment, and it was then

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contended that the plaintiff should have obtained a consent before he made the agreement or before he executed a formal transfer. But the agreement was made subject to the consent, and the formal transfer had no effect till registered, therefore neither would of itself operate as an assignment so as to be a breach of this covenant. There was no assignment until registration, and that was after the consent was obtained. This objection, therefore, is, I think, untenable.

It was then argued that the agreement and transfer were illegal as being in contravention of sub-sec. 2 of sec. 38 and of sec. 52 of "*The Land Act* 1884," and of the regulations, and of the covenants in the lease. This is again pointed at assigning without consent but I fail to see anything illegal in the transaction. The agreement was to transfer subject to the consent of the landlord, and that consent was duly obtained before registration. There is nothing in the agreement or in the formal transfer which would have the effect of violating any of the provisions of the Act or of the lease or of the regulations. The transfer of the lease which was effected by registration was perfectly legal, and there was nothing wrong in agreeing to sign or in signing a form of transfer prior to registration and subject to consent.

The only other point is a question of admission of evidence. During the trial a document was tendered by the plaintiff and received subject to objection. That document was the formal transfer signed by both parties, and the objection taken was that there was no sufficient stamp upon it within the provisions of the *Stamp Act* 1890. It is not necessary for me to decide this point, because, in my opinion, the plaintiff is entitled to recover, even if that document were not put in evidence. It was assumed by counsel on both sides (but, as I think, wrongly assumed) that this document was the transfer referred to in the agreement. A little consideration will show that this is not so. The agreement provides that payment is to be made as soon as transfer is completed. That does not mean that the defendant was to pay his money as soon as the plaintiff had signed a document of no value whatever in itself. The money is not to be paid till the transfer is completed; that is, till the lease is transferred by registration after consent. The transfer spoken of is not the mere paper form,

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e transfer of the property upon completion of title by proper ration. The plaintiff, in my opinion, could have succeeded ving the agreement, the consent, and the registration of the r by the Titles Office. The fact of registration would be *facie* evidence of a proper transfer without which the ment ought not to register, and it is the registration, and e form of transfer, which is of importance as passing the the land.

ese were all the points raised and argued, and as I think w and facts are against the defendant, there will be judg- or the plaintiff for 452*l.* 0*s.* 6*d.* and costs.

licitor for plaintiff: *Little.*

licitors for defendant: *Crisp, Lewis & Hedderwick.*

A. J. A.

KAUFMAN *v.* MICHAEL.

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May 12, 18.

A'Beckett, J.

nts Act 1890 (*No.* 1103), *s.* 208—*Statute of Frauds—Parol agreement to e a house for five years—Alteration of premises as agreed—Part perform- e—Unequivocal acts—Acts admitting of compensation.*

Sheppard v. Garner, 21 V.L.R. 242.

Dickinson v. Barn (1904) 2 Ch 329

performance to take the case out of the *Statute of Frauds* must consist of an cal act referable to some agreement in relation to the land, *i.e.*, of such a at if stated it would infer the existence of some agreement relating to the which case parol evidence may be given to show what the agreement was. easily admitting of compensation may yet amount to such part performance able the Court to enforce a parol contract.

action for specific performance of an agreement for a lease for five years, it ed that A had verbally agreed to let and B to hire a house for a term of five a fixed rent, on condition that A should re-paper one of the rooms of the th paper to the taste of B's wife, and should remove from B's then residence amp and water-heating machine and refit them in A's house. A re-papered and removed and refitted the lamp and heating machine as agreed.

, that these acts done by A were acts of part performance sufficient to take out of the *Statute of Frauds.*

TION by Jacob Bernard Kaufman against Bernard Michael s wife to enforce specific performance of a verbal agreement lease by the plaintiff of a certain house and premises in Melbourne for a term of five years or in the alternative nages for breach of such agreement.

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The plaintiff was the owner of a house in East Melbourne, and in May 1891 it was verbally agreed between the plaintiff and the two defendants that the plaintiff should let the same to Mr. Michael for a term of five years, from the 1st August, at a rental of 130*l.* per annum, if the plaintiff should make certain alterations to their satisfaction, which would be specified, including the re-papering of one room with wall paper to the taste of Mrs. Michael, and in fitting up in the house of a hall lamp and water-heating apparatus which the plaintiff was to take from the defendants' house at St. Kilda. The other alterations, which were trifling, were subsequently specified, and the plaintiff made these alterations and re-papered the room with a paper chosen by the defendants, and removed from the defendants' house the lamp and heating apparatus, and had them refitted in his house.

The defendants subsequently refused to take the house, and the present action was brought for specific performance or damages. The defendants pleaded sec. 208 of the *Instruments Act* 1890 (No. 1103), and the plaintiff relied on such alterations as being acts of part performance, taking the case out of the Statute.

Wanliss for the plaintiff—The alterations made, including the removal of the lamp and heating machine from the defendants' house, could only have been legally done pursuant to some agreement between the plaintiff and defendants either of sale or of letting and hiring. It is submitted that they are, therefore, acts of part performance referable to some agreement of this kind; that being so the case is taken out of the *Statute of Frauds*, and evidence may be given to show what the particular agreement was. It might be said that mere repairs to a man's own house would not necessarily refer to an agreement of this kind, but the removal of articles from the defendants' house and building them into his would necessarily refer to some such agreement. The oral evidence and the letters will show clearly the actual agreement.

Mitchell and *Pigott*, for the defendants, asked for judgment on the opening statement of the plaintiff's counsel—To take the case out of the Statute it is necessary to show some part performance which would render it inequitable for the defendants to raise the

Statute, and must not be merely matter which can be well compensated for: *Frame* v. *Dawson* (*a*). The alleged acts of part performance stated in the opening are merely matters of compensation.

[A'BECKETT, J. If a man says to another, "I will take your house for five years at 100*l.* a year, if you will knock two rooms into one," and the other agrees and does knock the two rooms into one, can the first then say, "Oh, I have changed my mind. I will not now take your house"?]

Frame v. *Dawson* is an authority for taking up such a position.

A'BECKETT, J. I have a very strong opinion that I should not stop the case on the opening.

Evidence was then called.

Mitchell and *Pigott* for the defendants—It is submitted that the acts of part performance necessary to take the case out of the Statute must be such as to change the nature or the tenure of the property, and must be unequivocally and in their nature referable to the particular contract: *Maddison* v. *Alderson* (*b*).

[A'BECKETT, J. One act would be quite sufficient, if distinctly applicable to the agreement. The taking out of the lamp and water-heater from the defendants' house and putting it in this, seems to me a most unequivocal act having reference to the agreement.]

It is quite as consistent with the existence of an agreement for sale and purchase.

[A'BECKETT, J. No doubt it is consistent with many other things, but it shows that there must have been some agreement.]

It must be consistent with the one particular agreement and with no other, according to *Maddison* v. *Alderson*. See also *Pulbrook* v. *Lawes* (*c*), where similar acts to the present were done.

[A'BECKETT, J. It is very easy to find expressions in some of the authorities in support of your view, but there are strings of

(*a*) 14 Ves. 386. (*b*) 8 App. Cas. 467. (*c*) 1 Q.B.D. 284.

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authorities the other way. It might be as well said that into possession is not an act of part performance, because it be referable to all sorts of agreements for all sorts of terms o purchase.]

Where it is merely a question of money payment which readily adjusted between the parties the Court will not all doctrine of part performance to be relied upon: *King* v. *wood* (*d*).

[A'BECKETT, J. In *Polleykett* v. *Georgeson* (*e*) there demurrer in an action by a person who had been tenant defendant who had allowed the landlord during his term to al premises in expectation of a new lease from the landlord. Molesworth, J., says at page 212:—

"The case of part performance by something done on the premises by t lord temporarily inconveniencing the tenant is novel; but it may be so necessarily referring to the contract, and something for which the tena obtain no other compensation than in the specific execution. Payment o has been held not a part performance as to the *Statute of Frauds*, because th who got it under a repudiated bargain may be compelled to refund at law. if the plaintiff here could find redress at law for his inconvenience."]

If the plaintiff is not entitled to specific performance, he entitled to recover damages for breach of contract: *Lan Pursell* (*f*). On the evidence it is, to say the least, do whether the alleged agreement was made with the hu or wife.

[A'BECKETT, J. I should say that the agreement prov with the husband, not the wife.]

Then the wife is entitled to judgment with costs.

Wanliss in reply.

Cur. adv. v

May 18.

A'BECKETT, J. This is an action to enforce specific pe ance of a verbal agreement to rent a house for five years, an of part performance are relied upon to take the case out Statute. These consisted in certain alterations made in the h the papering of a room with wall paper chosen by the defe

(*d*) 17 V.L.R. p. 258. (*e*) 4 V.L.R. (Eq.), 207. (*f*) 39 Ch. D.

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and the fitting up in the plaintiff's house of a hall lamp and water-heating apparatus taken from the defendant's house—the plaintiff having done these acts to comply with the conditions upon which the defendants had agreed to take the house. The defendant's counsel contended that such acts were insufficient to take the case out of the Statute, citing in support of this contention the case of *Frame* v. *Dawson* (*g*) and *Maddison* v. *Alderson* (*h*). In the former a party wall had been repaired under a verbal agreement to renew a lease, and this repair was relied upon as part performance and held insufficient on two grounds, firstly, that it was an equivocal act, and secondly, that it admitted of compensation. The acts done in the case before me certainly admitted of compensation, and a small sum would have sufficed to compensate. It is therefore said that specific performance should not be decreed. So far as the second reason for refusing relief in *Frame* v. *Dawson* is concerned, a long series of subsequent authorities shows that this view is no longer entertained. As is observed in *Fry on Specific Performance* (2nd ed.), p. 265:—"Nothing can be clearer than that there are many acts easily enough admitting of compensation which yet amount to such part performance as will enable the Court to enforce a parol contract." In other respects *Frame* v. *Dawson* is an authority for the plaintiff. It affirms the principle that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted to show what the agreement is. On the facts of that case it was held that the act done would not infer the existence of any agreement. The facts of the present case lead strongly to the inference that an agreement existed. When one man is found decorating his house with paper chosen by another, and fitting into his own house fixtures taken from the house of the other, some contract between them, having reference to the house in which these things are done, is at once suggested. The modern authority referred to by the defendants in no way conflicts with the old rule in reference to acts of this nature. In justifying the often-questioned doctrine on the subject Lord Selborne says at page 476:—"It is not unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land

(*g*) 14 Ves. 386. (*h*) 8 App. Cas. 467.

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unless signed, it has in view the simple case in which charged upon the contract only, and not that in which th equities resulting from *res gestæ* subsequent to, and arising the contract. So long as the connection of those *res gest* the alleged contract does not depend upon mere parol test but is reasonably to be inferred from the *res gestæ* them justice seems to require some such limitation of the scope Statute." Such a connection can reasonably be inferred he I feel no doubt of the sufficiency of the acts to take the case the Statute.

I have, however, to consider whether a definite parol agr has been proved on the evidence, which is in some part conflicting. On the whole, I think it was definitely agreed b the plaintiff and the defendant, Bernard Michael, that plaintiff making certain alterations and improvements whic agreed upon, and which were afterwards made, the defendan take the plaintiff's house for five years from the first day of 1891, at the rent of 130*l.* a year. This is not too vague an agr to be enforced. The statement of claim alleges that both defe entered into the agreement. The wife signed her name memorandum of alterations required, and took so active a the negotiations that the plaintiff, not unreasonably, treated interested in the contract. I think I ought not to refuse re account of this variance between the case pleaded and th proved. It is a variance which has not caused any addition The defendant, Bernard Michael, admits that an agreeme made. The only difference between him and the plaintiff as particulars of the agreement is that the defendant asserts was to be at liberty to take the house for any term he choose, long or short. I accept the plaintiff's version t house was taken for a definite term of five years. The de gave as a reason for breaking his contract that the plain been rude to his wife. According to the evidence there rudeness to her, and it was admitted that the true reason carrying out the agreement was that Mrs. Michael did not live in the house, having been informed by her cook that unhealthy. The defendant naturally yielded to his wife's ob and was willing to pay for any actual expense occasioned

plaintiff, but he refused to recognise that there had been any binding agreement to rent the house. In this he was wrong.

In reference to one part of the case, which is rather obscure on the evidence, I wish it to be understood that I should not regard any act of the plaintiff as part performance of the agreement if he had done the act after he had been informed that the defendants refused to be bound by the agreement and did not desire the act to be done. According to Mrs. Michael's evidence the moving of the lamp and the heating apparatus was after she had told the plaintiff she would not take the house. The plaintiff had given instructions to have these things removed before Mrs. Michael's visit, and the removal appears to have been effected without any obstruction or objection on the part of the defendants. But apart from this act, and whenever this may have been done, the papering of the room and other alterations were undoubtedly completed before the defendants had given any notice of their intention to break from the agreement, and would be enough in themselves to constitute part performance.

As to the relief to be given, though there are no difficulties in the way of decreeing specific performance, I think that damages for non-performance will better meet the justice of the case, unless the defendant prefers specifically to perform the agreement. I have been referred to the case of *Lavery* v. *Pursell* (*i*), as showing that where the Court cannot possibly decree specific performance it cannot give damages in an action such as this. In the present case there is no difficulty to prevent me from making a decree for specific performance, and, as the Court can now administer both law and equity, it is competent for me to give the plaintiff the remedy in damages which he asks in the alternative. If the defendant prefers it, and gives notice to that effect to the plaintiff within one week from this date, I will decree specific performance of the agreement already mentioned, but unless, within that time, he gives such notice, and informs the court that he has done so, damages will be given as hereinafter mentioned. The damages sought are excessive, and I give none for the termination of the previous tenancy, which was before any agreement had been concluded with the defendant. I direct judgment to be entered against the defendant,

(*i*) 29 Ch. D. 508.

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Bernard Michael, for 130*l.* damages and costs. The plaintiff to return to the defendant the lamp and heating apparatus within one week from the date of this judgment. No order made as to the defendant, Hilda Michael. This judgment is not to be entered until the 25th instant. In the interval, if the parties can agree as to the value of the lamp and heating apparatus, I will give the plaintiff the option of paying the value instead of returning them. The defendant, Bernard Michael, can, in the meantime, consider whether he will apply to alter the judgment, and if he does, I will draw up minutes for the usual decree for specific performance to be made with costs as against Bernard Michael.

Solicitor for plaintiff: *A. R. Daly.*

Solicitors for defendants: *Braham & Pirani.*

A. J. A.

1892

May 27, 30.

Hood, J.

GEMMELL *v.* GEMMELL.

Will construction—Trusts of will—Legal estate—Order XXV., r. 5.

Where the contest on the construction of a will was as to who was entitled to the legal estate, and there were no trusts to be declared, the Court of Chancery before the *Judicature Act* left the parties to their remedy in an action of ejectment or trespass, and this is not altered by the *Judicature Act*, or by Order XXV., r. 5; nor is the matter different where the person entitled to the legal estate is also entitled to the beneficial interest.

By his will, dated 23rd May 1864, Peter Fenwick directed his just debts, funeral and testamentary expenses to be paid as soon as possible after his decease, and provided as follows:—"I devise all my freehold lands and hereditaments whatsoever, situate in the colony of Victoria, to the use of John Gordon, of etc., and William Lang, of etc., their executors, administrators, and assigns, during the life of my sister Annie, the wife of William Gemmell, of etc., in trust, for her separate and inalienable use during her life, and subject thereto, to the use of the person or persons who, at my said sister, Annie Gemmell's, decease, would be entitled thereto by descent, in case she had died seized thereof in fee simple by purchase and intestate, if more than one in equal shares as tenants in common, and his or their heirs or assigns for ever." He then gave and bequeathed all his personal estate and effects whatsoever and wheresoever unto and

equally between three other of his sisters (named), and the survivors and survivor of them living at his decease, if only one to that one, and he then provided that "if neither of my said last-named three sisters shall survive me, then I direct that my said personal estate shall be divisible amongst the next of kin of my said last-named three sisters living at the time of my decease (exclusive of any husband) in a course of distribution according to the Statutes." And after giving powers of appointment of new trustees, he appointed the said John Gordon and William Lang to be trustees and executors of his will.

The testator died on 11th January 1866, leaving freehold land and hereditaments, and personal estate in Victoria, and probate was granted to his executors on 10th May 1866. Annie Gemmell died on 5th August 1878, leaving her surviving her husband, the plaintiff William Gemmell, her children, the other plaintiffs, Jeanie Colquhoun, Lely McEvoy, Annie Rebina Gemmell, Jessie Ross Gemmell, and William Bruce Gemmell, James Stewart Fenwick Gemmell and Ida Maud Gemmell, infants under the age of twenty-one years, by their next friend Charles Edward McEvoy, and the defendant Peter Fenwick Gemmell, her eldest son.

The defendant contended that on the proper construction of the will he was absolutely entitled in fee simple to all the freehold lands and hereditaments of the testator in Victoria as the heir at law of the said Annie Gemmell, and that the same was not divisible amongst the plaintiffs and him according to the *Statute of Distributions*. The plaintiffs claimed "(1) That the trusts of the said will may be declared by this Honorable Court; (2) all necessary directions and inquiries." The defendant by his defence submitted that there were no trusts of the will to be declared and no directions to be given or inquiries to be made, but if the Court should be of the contrary opinion, he submitted that the trustees of the will were necessary parties to the action, and he also submitted that if he was not entitled to the lands as heir at law, the only persons entitled were the children of Annie Gemmell, to the exclusion of her husband, the plaintiff William Gemmell.

Goldsmith for the plaintiffs.

Higgins for the defendant.

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GEMMELL v. GEMMELL.

Hood, J.

Higgins, after the pleadings were read, took a preliminary objection—The will is a devise to the use of A and B in trust for C during her life, and subject thereto to the use of the persons who would be entitled on the intestacy of C. C having died, the trusts cease, and there is then a devise of the legal estate to the persons entitled on her intestacy. The only question raised in this action is as to who those persons are, and it is submitted that that cannot be decided in an action to declare the trusts of the will, inasmuch as there are no trusts. Where the only question is who is entitled to the legal estate, it must be decided in an action of ejectment or trespass.

[*Goldsmith*—The Court has now power to make a merely declaratory judgment without granting consequential relief: Order XXV., r. 5; nor is it necessary to make an order for the administration of the estate: Order LV., r. 10. Besides, under the *Judicature Act*, law and equity may be administered on the same proceeding.]

A similar question was raised and decided in accordance with my contention in *Tierney* v. *Halfpenny* (*a*). Order XXV., r. 5., applies only to cases which, before the Act, would have come under the Chancery procedure, and was taken from the Chancery Procedure Act 1852 in England, as stated in *Hamilton's Judicature Act*, p. 153.

Goldsmith for the plaintiff—This is an action to declare the construction of a particular clause of a will, to determine who is entitled under the will, and the Court has power so to order under Order XXV., r. 5. The Court is not asked to put anybody out of or anybody into possession. It may be unnecessary to ask that the trusts of the will may be declared, though that is the usual form, but that is a mere matter of amendment.

HOOD, J. I think I ought to hear the case subject to the objection.

The case was then heard.

(*a*) 9 V.L.R. (Eq.) 152.

Higgins, in reply, cited on the objection taken by him *Morgan's Chancery Acts* (5th ed.), 157; *Webb* v. *Byng* (*b*); *Trustees of Birkenhead Docks* v. *Laird* (*c*).

Cur. adv. vult.

HOOD, J.- The statement of claim in this case set out certain clauses in the will of Peter Fenwick, deceased, and stated that the defendant claimed that on the proper construction thereof he was absolutely entitled in fee simple to all the freehold lands and hereditaments of the testator in Victoria to the exclusion of the plaintiffs. In the defence the objection was taken that there are no trusts of the will to be declared, and no directions to be given or inquiries to be made, and at the trial Mr. Higgins, for the defendant, urged that the case should not be entertained, but that the legal title to the land should be determined in the usual way by action of ejectment or trespass. Several authorities were cited in support of this contention, and the only answer put forward was that these decisions were before the *Judicature Act*, and Order XXV., r. 5, of the *Judicature Rules*. But these decisions were pronounced at a time when sec. 50 of the Chancery Procedure Act 1852 was in force, which is identical with Order XXV., r. 5, and they are referred to in the latest text books. I think, therefore, I must follow them. As to the effect of the provisions of the *Judicature Act* relating to the administration of law and equity by the one tribunal, I do not think they apply. Those provisions can only apply to proceedings in which both legal and equitable rights can be given effect to, and in the present instance I have not before me either the proper parties or the proper pleadings. I accordingly dismiss the claim, but without costs.

Solicitors for plaintiffs: *Brahe & Gair.*

Solicitors for defendant: *Malleson, England & Stewart.*

A. J. A.

(*b*) 8 De G. M. & G. 633.

(*c*) 4 De G. M. & G. 732.

1892
May 23, 26.

Holroyd, J.

NATIONAL TRUSTEES, EXECUTORS, AND AGENCY COMPANY LIMITED v. JOHNSON.

Will—Executors—Direction to sell and convert within twelve months—Postponement of sale by Court.

A testator by his will directed his executors to sell and convert into money his real, and such part of his personal estate as should not consist of money, within a period of twelve months after his decease, and invest the proceeds as therein mentioned, and pay the income to his wife for life, and on her death to his children (several of whom were infants) until the youngest should attain twenty-one, and then to divide the principal among them. The executors renounced probate, and administration *c.t.a.* was granted to the plaintiff company. The debts, funeral, and testamentary expenses had been paid, and the principal part of the property unsold consisted of a large number of shares in a limited liability company. The plaintiff company, just within twelve months of the testator's death, brought an action, alleging that the company in which these shares were was a substantial and solvent one, with good prospects, and paying dividends; that the market for the shares was, and had been since the testator's death, very bad, but that it was not likely to become lower, and that there was a good prospect of their being able to sell the shares at a good price within one or two years, and the defendants had requested the plaintiff to postpone selling the shares. The adult beneficiaries admitted these allegations, the infants putting in the usual defence, and the Court made an order allowing eighteen months within which to sell at a fixed price, without prejudice to an application by any of the parties for a further postponement.

James Johnson, late of Horsham, died on the 23rd January 1891, leaving a will, by which he appointed Messrs. Fraser and Kennedy executors. They renounced probate, and administration *c.t.a.* was granted to the National Trustees, Executors, and Agency Company of Australasia Limited on 19th February 1891.

By his will, after directing that his debts, funeral, and testamentary expenses should be paid, and making a bequest of his household furniture to his wife, he gave, devised, and bequeathed all his real estate, and also all mining shares, money secured by policy of insurance, moneys in bank, and all other personal estate, not thereinbefore specifically bequeathed, of which he should be possessed at his death, to Fraser and Kennedy, "upon trust, to sell and convert into money my said real estate, and such of my personal estate as shall not consist of money, within a period of twelve months after my decease, and invest the moneys obtained by such sale and conversion upon mortgage of real estate, or in the purchase of Government debentures, or the debentures issued by any municipality, and to pay the interest, dividends, and annual produce arising therefrom" to his wife for life, and upon her death to his

en till the youngest should attain twenty-one, then to divide incipal moneys among his children in equal shares.

e testator left a widow and nine children, two of whom were and the rest infants. The debts, funeral, and testamentary es had been paid, and the net value of the estate was 7,780*l.* The company brought an action against the and all the children by writ issued the 11th January 1882, ch they alleged that the principal property left by the r consisted of 15,000 shares in a limited liability com- alled the Victorian Farmers' Loan and Agency Company d, which was incoporated in 1884 under "*The Companies* 1864" for the purpose of carrying on the business r, miller and grain and produce merchants, the capital ich was 300,000*l.*, in 150,000 shares of 2*l.* each. Of ,000 shares held by the testator, 7,000 were paid up to d 8,000 paid up to 5*s.* The plaintiff had sold 2,110 of the at 15*s.* per share, and 2,175 of the latter at 3*s.* 3*d.* per The market for such shares had been since the death of the r, and still was, very bad, and the defendants had requested intiffs to postpone the sale of the remaining shares. This ny was a substantial and solvent one, with good prospects, ying dividends, and the market price of the shares was not to become lower, calls were not likely to be made for a long nd there were good prospects of the plaintiffs being able to e shares at a good price within one or two years. The f company claimed that it might be at liberty, notwith- ng the terms of the will, to postpone the sale of any of the shares until it should deem expedient, or until the further f the Court.

e adult defendants admitted the various allegations made by intiff, and the infants submitted their interests to the ion of the Court.

ggins for the plaintiff.

yes for the widow and two adult children.

sen, for the infant children, cited *Fox* v. *Dolby* (*a*).

(*a*) W.N. 1883, p. 29.

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NATIONAL TRUSTEES, EXECUTORS, AND AGENCY CO. LIMITED v. JOHNSON.

Holroyd, J.

May 26.

HOLROYD, J., said that he would make the order sought, allo eighteen months to sell at not less than a price to be fixed. Mi to be submitted to him next Thursday.

HOLROYD, J., made the order adopting the following minut judgment, signed by counsel :—

ORDER that the plaintiff company be at liberty, notwithstanding the directi the will, to postpone the sale of all or any of the unsold shares from the exp of the period prescribed by the will until the further order of the Court, o other time or times as the plaintiff company may deem expedient, but not exc eighteen months from this date, without prejudice however to any application b of the parties for a further postponement. Order that in the meantime the pl company take such steps, under the advice of their brokers, as they may expedient for the purpose of selling the unsold shares, either as a whole or in l prices of not less than 15*s.* for every share on which 1*l.* is paid up, and of n than 3*s.* 3*d.* for every share on which 5*s.* are paid up. Any of the parties her be at liberty to apply as occasion may require. Order that the costs of all pa this action be taxed, the costs of the plaintiff company as between solicitor and and paid out of the estate of the testator.

Solicitors for plaintiff: *Gavan Duffy & King.*
Solicitor for adult defendants: *Dickinson.*
Solicitors for infants: *Madden & Butler.*

A. J.

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April 28, 29.
June 2.

BEAN v. HARPER & COMPANY.

Employers and Employés Act **1890 (*No.* 1087), *s.* 38 (1)—*Defect in pl machinery—Proximate cause of accident—Negligence of fellow servant.***

In an action brought by the plaintiff under sec. 38, sub-sec. 1, of Act No against the defendant for injuries caused by a defect in the plant connected v used in the business of the defendant, the jury found that the injuries were cau the defect in the plant and also by the negligence of a fellow workman.

Held, that sec. 38, sub-sec. 1, of Act No. 1087 is not confined to cases wh defect complained of is the *sole* cause of the injury, but that it is sufficient proved that such defect was a direct and proximate cause.

SPECIAL CASE.

This was a special case stated by a judge of the C Court for the opinion of the Full Court. The facts se were as follow :—The plaintiff, who was in the employ o defendants, sued the defendants for damages for injuries sust by him by reason of the defendants providing defective pla

nery in connection with their business. The plaintiff was yed at the mills of the defendants, and on the occasion of the nt he was coming out of a doorway near to a place where were being sent down a shoot provided for that purpose. the sacks slipped off the shoot and struck and injured the ff, owing, as he alleged; to a defect in the shoot. The ants contended that the accident was caused by the negli- of a fellow servant of the plaintiff's, and not by reason of any in the shoot. The judge at the trial directed the jury that accident happened by reason of the defect in the shoot, the ants were liable; but if the accident was caused by the nce of the fellow servant, the defendants were not responsible; the negligence of the fellow servant would not have caused cident except for the defect in the shoot, the defendants were The jury awarded 193*l.* as damages to the plaintiff, and in to questions put to them, found that the injury was not ned solely by reason of the defect in the shoot nor solely h the negligence of the fellow servant, but arose through onjointly. On these findings the defendants moved to set the verdict of the jury and to have judgment entered for The learned judge of the County Court at the hearing application, stated a special case for the opinion of the ourt, asking the questions which are set out in the judgment Court.

Arthur for the plaintiff—The plaintiff in this case has d injury through the negligence of the defendant, and the ant cannot be allowed to excuse his negligence by setting up gligence of another person. The negligence of the other was not the sole cause of the injury, and would not have the injury at all except for the negligence of the defendant. cident was caused by reason of the negligence of the defen- nd "by reason of" does not mean "solely by reason of": *. Armstrong* (*a*). Sec. 38, sub-sec. 1, of the *Employers and yés Act* 1890 imposes a duty upon the employer to use due providing machinery or plant reasonably fit for the purpose

(*a*) 13 App. Cas. 1.

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for which it is required. That being so, the employer cannot escape from the responsibility thus imposed, and say that, though the machinery was unfit, yet there was another contributing cause which relieves him. In *Smith* v. *Baker* (*b*) the duty cast upon the employer arising out of the contract of employment is "a duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition." Whatever the dangers of employment may be which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence: *Smith* v. *Baker*.

Counsel also referred to *Johnson* v. *Lindsay & Co.* (*c*).

Duffy for the defendant—The employer, under the Act No. 1087, is to be liable for injury by reason of any defect if the accident is caused through his negligence or the negligence of certain specified classes of men, but beyond those specified classes the defence of "negligence of a fellow servant" is an answer to the action. The only fellow servants whose negligence cannot be set up are specified in the sub-secs. of sec. 38. The section is merely an enlargement of the employer's liability in respect of those particular classes: *Yarmouth* v. *France* (*d*); *Beven on Negligence*, p. 416. The accident did not arise by reason of the defendant's negligence alone, but also by reason of the negligence of a fellow workman; that fellow workman does not come within any of the classes mentioned in the Act, and therefore his negligence is as complete an answer as if the plaintiff had himself contributed to the accident and the defence of contributory negligence had been set up. The intention expressed by the Legislature in secs. 38 and 39, is to make the employer liable for his own negligence, subject to certain cases, and for the negligence of other specified classes of workmen employed by him. The common law doctrine of the negligence of a fellow servant is only touched by sub-secs. 2, 3, 4, and 5 of sec. 38. Supposing that the shoot was defective, yet, as the accident was brought about by the negligent independent act of another person, the general rule is that the person whose default has caused the first negligence is not liable: *Beven on Negligence*, p. 959. If a

(*b*) 1891 A.C., p. 362. (*c*) 1891 A C. 371. (*d*) 19 Q.B.D. 647, p. 662.

person commits a wrong he is responsible for the probable and reasonable effect of that wrong: *Clarke* v. *Chambers* (*e*). It certainly was not a reasonable consequence of this shoot being left in a defective state that another person would use it negligently. Counsel referred to the following cases: *Smith* v. *London and South-western Railway Co.* (*f*); *Hill* v. *New River Co.* (*g*); *Martin* v. *Connahs Quay Co.* (*h*); *Heske* v. *Samuelson* (*i*); *Cripps* v. *Judge* (*k*); *Walsh* v. *Whiteley* (*l*); *Thomas* v. *Quarterman* (*m*); *Griffiths* v. *London & St. Katharine Docks Co.* (*n*); *Wilson* v. *Merry* (*o*).

McArthur in reply cited the following cases: *Burrows* v. *March Gas Co.* (*p*); *Chandler v. Melbourne & Hobson's Bay Railway Co.* (*q*).

Cur. adv. vult.

The judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT, and HOOD, JJ.] was delivered by HOOD, J. This is a special case stated under sec. 135 of the *County Court Act* 1890 for the opinion of this Court. The plaintiff, whilst in the employ of the defendants was injured through being struck by a bag which fell upon him, as he alleged, by reason of defects in a certain shoot used as a portion of the defendant's plant, and he sued the defendants for compensation under the *Employers Act* 1890. The action was tried in the County Court before a judge and a jury, when the defendants contended that the injury to the plaintiff was occasioned through the negligence of a fellow servant and not by reason of any defect in the shoot. The jury gave a verdict for the plaintiff but found, in answer to special questions, that the accident did not arise solely through the negligence of the fellow servant, nor solely through a defect in the shoot, but arose through both conjointly. The defendants then applied to set aside the verdict and enter judgment for them on the ground that on the findings they were

(*e*) 3 Q.B.D. 327.
(*f*) L.R. 5 C.P. 98.
(*g*) 18 L.T. (N.S.) 305.
(*h*) 33 W.R. 216.
(*i*) 12 Q.B.D. 30.
(*k*) 13 Q.B.D. 583.
(*l*) 21 Q.B.D. 371.
(*m*) 18 Q.B.D. 685.
(*n*) 13 Q.B.D. 289.
(*o*) L.R. 1 Sc. App. 326.
(*p*) L.R. 7 Ex. 96.
(*q*) 2 A.J.R. 53.

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entitled to judgment, or, in the alternative, for a new trial, on the grounds of misdirection and verdict against evidence. Upon this application the learned judge reserved the following questions for the opinion of this Court:—(1) On the findings of the jury in answer to the questions put to them are the defendants entitled to have judgment entered in their favour? (1A) Is the plaintiff entitled to have judgment entered for him on the verdict of the jury? (2) Was there a misdirection to the jury in telling them that, if the negligence of McDonald would not have caused the injury except for the defect in the shoot, the defendants were liable? (3) On this evidence what would be the proper direction to the jury?

By sec. 38, sub-sec. 1, of the *Employers and Employés Act* 1890 it is enacted that where personal injury is caused to a workman by reason of any defect in the state or condition of the plant used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer. The first point to be considered in this case is the meaning to be attached to the words "injury caused by reason of any defect." Is the section limited to cases where the defect is the sole cause of the injury? The jury here has found that the accident by which the plaintiff was injured arose by reason of two causes, viz., the negligence of McDonald, a fellow servant, and a defect in a shoot used as part of the plant. Is such a case within this section? In our opinion it is. The section is not, we think, confined to cases where the defect complained of is the sole cause of the injury, but it applies if such defect be a direct and proximate cause. In the present case the finding of the jury, considered with the fact of the position of the defendant John Harper as manager of the works amounts to saying that the shoot was not reasonably fit for use to the knowledge of that defendant, and that the plaintiff would not have been injured at all except for the defect in the shoot. That is to say they have found that the defect in the shoot was a proximate cause of the accident, and that if the shoot had been reasonably fit for its work McDonald's negligence would have been harmless. How then can it be said that the injury to the plaintiff was not

caused by reason of the defect when the defect itself was an immediate cause of the injury? It was urged for the defendants that the plaintiff would not have been injured by the defect in the shoot except by reason of the negligence of McDonald. That is so, but it does not follow that because the plaintiff was injured by reason of McDonald's negligence he was not also injured by reason of the defect. There may well be two direct and proximate causes of the one injury. If we consider the object of the Legislature we find that it was to increase the liability of employers. The Act as originally passed into law was called "An Act to *extend* and regulate the liability of employers and to make compensation for personal injuries suffered by workmen in their service" (50 Vic. No. 894), and it cannot be supposed that the Legislature intended that an employer who negligently allows his plant to be out of order should escape liability when an accident occurs in the use of that plant simply because his negligence was not the only operating cause. So far as defects in plant are concerned, one limitation on the liability is created by sec. 39, sub-sec. 1, which provides that the defect must arise or exist either by personal negligence of the defendant or by the negligence of some person entrusted with the duty of seeing after the plant. Another limitation is provided by sub-sec. 3 of the same section, which prevents the workman from recovering under certain circumstances where he knew of the defect and failed to inform the employer. These are the only express limitations of the liability of the employer in such cases, and we see no reason to imagine that the Legislature intended that any others should be implied. We think, therefore, that the plaintiff brings his case within the Act when he proves that the defect in the plant was a direct, proximate, and efficient cause of his injury, that defect having arisen through the defendants negligence and being unknown to the plaintiff.

The case then being within the Act, the workman is to have the same remedy as if he had not been in the service of the employer, and is to be in the same position as a person lawfully upon the premises of the defendants would have been. To an action brought by such a person injured in the way that the plaintiff was injured, we think it clear there would have been no defence, as the injury would have been caused by the negligence of the defendants person

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conjointly with that of their servant, for both of which they are responsible. As McDonald was in the defendants' employ, there is no need to consider the elaborate arguments founded upon the supposition that a third independent party had intervened. This view of the law disposes of the first question, to which we answer "No." Question 1A, we were informed, was intended to raise the point whether the plaintiff was entitled to a verdict on the general finding if we were adverse to him upon the previous question, and in that view it becomes unnecessary to answer it. To the second question, as it stands, we answer "No." We were urged to treat this question as relating to the sufficiency of the direction, which, it was contended, did not go far enough in explaining the law to the jury. Such a defect, however, even if it existed, would be a non-direction, and we do not think that the point is raised or was intended to be raised. If the third question is meant, as we understand it, only to apply in case we should hold that there had been a misdirection, then it need not be answered.

The defendants must pay the costs of, and occasioned by the hearing of, this case.

Solicitors for plaintiff: *Abbott, Eales & Beckett.*
Solicitors for defendants: *Klingender, Dickson & Kiddle.*

W. H. M.

F.C.
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June 6.

HODGKINSON *v.* HODGKINSON.

Husband and wife—Marriage Act 1890 (*No.* 1166), *sec.* 74, *sub-sec.* (*b*).

In a suit by a husband against a wife for dissolution of marriage on the grounds that during three years and upwards the wife has "been an habitual drunkard and habitually neglected her domestic duties or rendered herself unfit to discharge them," it is not required to show that the period of three years during which this conduct took place came immediately before the institution of the suit; all that is required is to prove that this conduct took place for the period of three years, whenever that period took place.

APPEAL from judgment.

Appeal by Jane Wilkinson Hodgkinson, from a judgment of A'Beckett, J. The husband petitioned for a dissolution of his marriage on the ground that during three years and upwards the wife had been an habitual drunkard and habitually neglected

her domestic duties, or rendered herself unfit to discharge them. The evidence showed that for the period of fourteen months prior to the institution of the suit the wife had been subjected to treatment for the cure of alcoholism in a convent, and that on the day she left that institution she had been served with the citation. It was contended before the learned primary judge that the conduct mentioned in sec. 74 sub-sec. (b) of the *Marriage Act* 1890 must be habitual conduct during a period of three years immediately preceding the institution of the suit, and that the intervening period of fourteen months prevented the sub-section from applying. The learned primary judge, however, overruled this contention, and granted a decree *nisi* for dissolution of marriage. From this decision the wife now appealed.

Johnston for the wife appellant—Proof of the misconduct mentioned in sub-sec. (b) of sec. 74 must apply to a period of three years immediately before the institution of proceedings. You cannot pick out any period of three years of the domestic union and rely on them as sufficient to entitle the petitioner to relief under the sub-section. Otherwise, if the parties had been married for ten years and the wife had committed the conduct mentioned for the first three years of married life and had been a reformed character for seven years, then the husband could still apply for a dissolution of marriage.

Woolf for the husband respondent was not called on.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. We are of opinion that the objections taken to the judgment of the learned primary judge have not been supported. The first objection taken raises a question which, at first sight, appears to be deserving of some attention. It has been argued that under sec. 74, sub-sec. (b), of the *Marriage Act* 1890, the habitual conduct which constitutes the right of the husband to a dissolution of marriage must have been conduct habitually pursued for the period therein mentioned, viz., three years, up to the time and immediately before the time of the institution of the suit, and that in order to obtain a decree

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for a dissolution of marriage the petitioner must show that wife has been an habitual drunkard, and has been guilt habitual neglect or habitual unfitness to discharge her dom duties for a period of three years immediately preceding institution of the suit. If the two sub-secs. (a) and (b) stoo themselves I should feel much pressed with the argument forward, but when they are compared with the two subsec sub-secs. (c) and (d), the difference of the language there shows that the Legislature could not have intended that the hab conduct mentioned in sub-sec. (b) should be confined to the years immediately preceding the institution of the suit, fo sub-sec. (c) it is provided that where "at the term of the pres tion of the petition the respondent has been imprisoned period of not less than three years," etc., the petitioner may o a dissolution of marriage. That sub-sec. confines the perio three years to the three years immediately preceding the pres tion of the petition. So also in sub-section (d), the period mentioned, viz., one year, within which certain crimes have committed, is confined to the year immediately preceding institution of the suit. Now the absence of words limiting period of three years in sub-sec. (b) appears to show tha Legislature did not intend to limit the period to the three immediately preceding the institution of the suit, and all th required in order to obtain the relief given by sub-sections (a (b) is to prove the desertion or habitual conduct for the p mentioned whenever that period took place. It may be that habitual conduct was proved for the period mentioned at a long anterior to the institution of the suit, the husband or wi the case might be, would be unable to obtain the relief so because, if the time had long since expired and the institutio the suit had been delayed without any sufficient cause assi the Court might refuse to grant relief, as the Legisl does not intend to render the grant of relief compulsory the application for it is not made within a reasonable But where delay cannot be alleged, and is not alleged, we that it is not necessary to show that the expiry of the mentioned in sub-section (b) took place immediately precedin institution of the suit.

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HODGKINSON v. HODGKINSON.

Higinbotham, C.J.

The second ground of objection is answered by the judgment itself. It has been contended that the evidence did not justify the conclusion that the respondent had been an habitual drunkard and had, during a period of three years, habitually neglected her domestic duties or rendered herself unfit to discharge them. The learned judge, we think, has found that the evidence proved that neglect and unfitness during that period, and his judgment based on findings of fact upon evidence most conflicting, and which caused great doubt in his mind, will not be overruled by us. The whole of his language implies that the evidence of the respondent's frequent unfitness to discharge her domestic duties led him to the conclusion that she was an habitual drunkard.

The appeal has failed on both grounds and must be dismissed with costs.

Proctors for the respondent appellant: *McKean & Leonard.*

Proctors for the petitioner respondent: *Pentland, Roberts & Thompson.*

A. F. M.

[IN CHAMBERS.]

1892

June 8, 10.

A'Beckett, J.

BROWNE *v.* ROYAL PERMANENT BUILDING SOCIETY.

Building Societies Act 1890 (*No.* 1068), *sec.* 29, *sub-sec.* 3.—*Voluntary dissolution—Judgment obtained against society—Stay of execution—Rights of creditor after proceedings for voluntary dissolution have commenced.*

Proceedings for dissolution taken by a building society under the provisions of sub-sec. 3, sec. 29, of the Act No. 1068 are not equivalent to the voluntary winding up of a company. A creditor who has obtained a judgment against a building society which is in course of dissolution under the above section may notwithstanding enforce his judgment by execution.

APPLICATION on behalf of the defendants for an order that execution and all further proceedings be stayed on the ground that the defendant society was in course of voluntary dissolution under the provisions of sec. 29, sub-sec. 3, of the *Building Societies Act* 1890. The plaintiff had obtained a judgment against the defendant society.

Weigall in support—The defendants are protected, because they are in a position equivalent to that of a company which is being

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A'Beckett, J.

voluntarily wound up. He cited *Gray* v. *Australian Deposit and Mortgage Bank* (*a*); *Liverpool Household Stores Association* (*b*).

Isaacs to oppose—A creditor must not be obstructed in his rights because the members of a society choose to go into a voluntary dissolution. In this case, too, the instrument of dissolution can be shown to be a document not complying with the requisites mentioned in the Act.

Cur. adv. vult.

A'BECKETT, J. This is a case in which judgment has been obtained against the society, and immediately afterwards a summons was heard on an application by the defendant for an order that execution and all further proceedings should be stayed on the ground that the society was in course of voluntary dissolution under the provisions of sec. 29 of the *Building Societies Act* 1890 (No. 1068). In support of the application it has been said that this society has availed itself of one of the provisions of sec. 29, namely, sub-sec. 3. This sub-section provides:

"In cases where no manner is prescribed by its rules by dissolution with the consent of three-fourths of the investing members holding not less than two-thirds in value of the investing shares in the society then current testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth—

(A) The liabilities and assets of the society in detail.

(B) The number of members and the amount standing to their credit in the books of the society.

(C) The claims of depositors and other creditors and the provision to be made for their payment.

(D) The intended appropriation or division of the funds and property of the society.

(E) The names of one or more persons to be appointed trustees for the special purpose of winding up the society, and their remuneration.

Alterations in the instrument of dissolution may be made with a like consent testified in the same manner. The instrument of dissolution and all alterations therein, shall, when signed by the required number of members, be transmitted to the Registrar, together with a statutory declaration by the secretary verifying the signatures thereto, and that it is signed by the required number of members, and shall thereupon be registered by the Registrar, and shall be binding upon all the members of the society."

In support of the application, it was suggested that proceedings under this section were equivalent to a voluntary winding up, and

(*a*) 13 A.L.T. 230. (*b*) 4 *Times* Rep. 722.

that a society being dissolved under this section should have the same protection from the claims of its creditors as a company receives which is being voluntarily wound up. I see no reason to adopt this argument. Even assuming that all the provisions of the 3rd sub-section have been complied with, I would still say that that sub-section merely provides a means by which a society or its members may settle among themselves a scheme for dissolution, and cannot bind anyone else. It would be an extraordinary thing if by proceeding under this section they could frustrate the legal rights of a creditor. I do not regard this scheme for dissolution as obstructing the rights of creditors any more than the rights of creditors of a private person would be obstructed because his debtor had made some arrangement with certain of his creditors. It is, therefore, in my opinion, quite unnecessary to enquire whether the proposed scheme satisfies the requirements of the Act. It has been suggested that I have a discretion in the matter, but even if I had I should not exercise it in this case, as the signatures to the instrument of dissolution have not been properly verified. All I decide, and without any doubt, is that a Court should not obstruct a creditor by reason of any arrangement made by a society under this section. I refuse the application with costs.

Solicitors for plaintiff: *Crisp, Lewis & Hedderwick.*
Solicitors for defendants: *Davies, Price & Wighton.*

A. F. M.

F.C.

1892
June 8, 9.

IN RE CHATSWORTH ESTATE COMPANY, EX PARTE MARRIOTT.

Company—Rectification of register—Shares held in trust until transfer—Transfer of shares by trustee.

M., an accountant in The Real Estate Bank, took a transfer of shares in The Chatsworth Estate Company, and became registered as holder in respect of such shares. A deed was executed between M. and The Real Estate Bank, whereby it was declared that M. should hold the shares subject to the direction of the bank, and should transfer them as required by the bank, and until such transfer should stand possessed of the shares in trust for the bank; the bank undertook to indemnify M. against all losses. Subsequently, after the execution of the deed, M. transferred the shares at the direction of the bank to some nominee of the bank, whose name did not appear. The Chatsworth Estate Company went into liquidation. M. then applied to have the register of the company rectified by removing his name and substituting the name of the bank therefor.

Held, that as soon as the shares had been transferred by M. at the request of the bank, his duties as trustee ceased, and that he was entitled to have the register rectified.

APPEAL from judgment.

This was an appeal from an order made by Williams, J., in the Practice Court, directing the name of H. G. Marriott to be removed from the register of The Chatsworth Estate Company, and directing the name of The Real Estate Bank to be substituted therefor. It appeared from the affidavits that the directors of The Real Estate Bank, in whose possession the scrip for the shares was, requested Marriott, who was the accountant of the bank, to take a transfer of the shares in his own name. Marriott deposed, in his affidavit, that he signed the transfer under pressure, fearing that his refusal might jeopardise his position in the bank. A deed was executed by the bank and Marriott, containing, *inter alia*, the following clause:—

"That the said H. G. Marriott his heirs etc. shall and will at all times hereafter at the request costs charges and expenses of the said bank its successors or assigns assure transfer assign and dispose of the said hereinbefore recited shares or any number or numbers thereof and all rights privileges and benefits thereunder unto the said bank its successors or assigns or as it or they shall direct or require and for the purposes aforesaid or any of them to do sign and execute all matters deeds instruments writings assurances and things which shall be necessary in the premises and that in the meantime and until any such assurance transfer or assignment as aforesaid he the said H. G. Marriott his heirs etc. shall and will stand possessed of the said shares and premises and the rights privileges and benefits derivable thereunder in trust only and for the sole use and benefit of the said bank its successors or assigns."

Then the deed contained a clause guaranteeing Marriott in the following words:—

"The said bank will duly and punctually pay all calls and other outgoings and all and every other claims or claim of any nature or description whatsoever which shall be legally due and payable by the holder registered proprietor or owner of the hereinbefore recited shares and premises and will at all times hereafter keep the said H. G. Marriott his heirs etc. fully indemnified against all actions proceedings suits claims demands damages costs and expenses which the said H. G. Marriott his heirs etc. may have incurred or sustained or may incur or sustain or be put to in consequence of or by reason of his accepting and acting or having accepted or acted in the said trust."

Subsequently, though at what date did not appear, Marriott transferred the shares by the direction of the bank. It was not alleged to whom the transfer was made. After the transfer was made The Chatsworth Estate Company went into liquidation, and Marriott, finding that his name was still on the register, applied to the Court for rectification of the register by substituting the name of The Real Estate Bank for his. The application was made to Williams, J., who made the order as sought. The Real Estate Bank now appealed from that order.

Fink and *Topp* for the appellants.

Higgins for the respondent Marriott.

Mackinnon for the liquidator of The Chatsworth Estate Company.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. We are of opinion that this appeal must fail, and that the order of the learned judge must be affirmed. The point to which the arguments were directed is, we think, a simple point, and it arises upon the deed executed on the 24th August 1891 between the respondent Marriott and the appellant the Real Estate Bank.

It appears from that deed that Marriott, who was the accountant of the bank, became the purchaser and owner of 17,500 shares as trustee for the bank, and that those shares were paid for by moneys the property of the bank. For some reason, not disclosed, it was the desire of the bank that its ownership should not be apparent, and it accordingly procured the accountant Marriott to take over

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these shares, and to become registered in respect of the sa
own name. He states that he was compelled to do s
position in which he stood, and the apprehension lest h
forfeit that position if he refused to become the registere
That compulsion is not a legal compulsion that can be re
as something which would relieve him from the liability
incurred by his own act in executing the deed, and it
explain the circumstances under which it was agreed tha
not the bank should be registered as owner of these shar
terms upon which he should become the registered ow
should hold the shares for the bank, and the period for
should remain trustee for the bank, are all determined by
of the 24th August 1891. (His Honor read the terms of t
The trust created by that instrument is limited to the tim
which Marriott holds these shares, and prior to the time
assigns them, or otherwise disposes of them, either to the
in the manner the bank shall direct. As soon as that tim
he has discharged the duties he assumed as trustee, and i
in the meantime, after the execution of the deed and b
disposes of these shares in accordance with the direction
bank, that he engages to hold and stand possessed of th
for the benefit of the bank. The bank, on the other hand
indemnity clause secures him against all liability which
incur by virtue of his acceptance of this trust, and that
might include all liabilities which devolved upon him after
assigned the shares according to the directions of the b
before some other person had taken his place on the registe
that being the engagement entered into, it appears that
the following year, in February 1892, the bank went into
tion, and at some time, it does not appear exactly when
some time before the bank went into liquidation, the dir
the bank requested Marriott to transfer the shares ment
the affidavit. To whom these shares were directed to be tr
does not appear, nor does it clearly appear when the tran
made, but it must be assumed that it was sometime, howev
after the deed was executed. The terms of the deed con
that the direction or request to transfer is something which
subsequent to the execution of the deed. The deed indic

time the shares had not been transferred, and it must be d, we think, from the language of the deed that it contem- a future request to transfer the shares. As soon as the are transferred the duty of the trustee ceases. The bank is ieved from its indemnity at that time. Marriott is relieved he duties of the trust, and for the purpose of being effectually d he made the application to rectify the register by sub- ng the name of the bank for his name. We think he was d to obtain the relief which the Court below has granted. rgument below appears to have proceeded upon entirely nt grounds from those presented to this Court. The argu- appears to have been directed to the question—how far a could or could not compel his *cestui que trust* to accept a tion of the trust? In this Court it has become apparent he real question turns upon the construction of the deed ed between the parties. We have no doubt upon the proper uction of that deed, and the fact which has been disclosed he transfer was actually made before The Chatsworth Estate ny went into liquidation, that the applicant is entitled to ief which he has asked for. The appeal will be dismissed inst the respondent Marriott, with costs. The Chatsworth Company must abide its own costs.

Appeal dismissed.

icitors for the appellant: *Fink, Best & P. D. Phillips.*
icitors for the respondent: *Smart & Walker.*
icitors for the liquidator: *Blake & Riggall.*

W. H. M.

F.C.
1892
June 13.

THOMSON *v.* SCHAEFER (COHEN, CLAIMANT IN INTERPLEADER AND ASSIGNEE IN INSOLVENCY).

Insolvency Act 1890 *(No.* 1102*), secs.* 76, 77—*Supreme Court Act* 1890 *(No.* 1142*), sec.* 104—*Foreign attachment—Seizure without sale by sheriff—Subsequent sequestration of debtor's estate.*

The plaintiff (execution creditor) obtained a judgment against a debtor, having previously, by a writ of foreign attachment, attached all the property of the debtor in the hands of a third party. The sheriff levied upon this property, but before it was sold the estate of debtor was placed under sequestration. On interpleader summons,

Held, that the fact that judgment was preceded by a writ of foreign attachment did not constitute any exception to the operation of sec. 76 of the *Insolvency Act* 1890, that the plaintiff was not entitled to any charge or security upon the proceeds of the sale of such property, but that the assignee in insolvency was entitled to possession of the goods free from any charge in favour of the plaintiff for the benefit of all the creditors.

SPECIAL CASE.

This was a special case upon an interpleader summons stated by Hodges, J., for the opinion of the Full Court. The special case was as follows:—

1. This action was commenced on the 18th of November 1891, by a writ of summons whereby the plaintiff claimed against the defendant 509*l.* 16*s.* 9*d.* for principal and interest due upon five bills of exchange accepted by the said defendant, and for notarial charges and exchange paid in respect thereof.

2. The said writ of summons was returned *non est inventus*, and thereupon, on the 21st of November 1891, the plaintiff issued a writ of foreign attachment in the said action directed to E. G. Schaefer, of Lonsdale Street, Melbourne, and Wilson Street, Caulfield, in the colony of Victoria, importer, for the purpose of attaching in the hands of the said E. G. Schaefer the lands and other hereditaments, moneys, and chattels, bills, bonds, and other property of whatsoever nature in the custody or under the control of the said E. G. Schaefer at the time of the service of the said writ of foreign attachment belonging to the said defendant, or to which or in which the said defendant was legally or equitably entitled or otherwise beneficially interested, and all debts of every kind due by the said E. G. Schaefer to the said defendant, and the said writ of foreign attachment was duly served on the said E. G. Schaefer on the 21st day of November 1891.

On the 18th day of December 1891, the plaintiff duly
ed final judgment against the defendant in this action for
m of 509*l.* 16*s.* 9*d.* and 30*l.* 7*s.* costs of suit.

On the 18th day of December 1891, a writ of *fi. fa.* was
upon the said judgment and lodged with the sheriff of the
l Bailiwick for execution.

On the 18th December 1891, the said sheriff levied under
d writ of *fi. fa.* upon the stock-in-trade and other goods and
s of the said defendant then, and at the time of service of
id writ of foreign attachment, in the custody of the said
Schaefer, as manager in Victoria of the defendant's business
mporter.

On the 23rd of December 1891, the estate of the above-
defendant, Philip Paul Schaefer, was placed under seques-
under and in accordance with the provisions of the
ncy Act 1890, in the hands of the above-named claimant,
l Henry Cohen, as one of the assignees of insolvent estates,
trustee has been appointed.

That, on the 5th January 1892, an interpleader summons was
ut by the sheriff of the Central Bailiwick in this action calling
Baker & Son and the said claimant, Samuel Henry Cohen, as
ssignee as aforesaid, to appear before a judge, and state the
and particulars of their respective claims to the said stock-in-
goods, and chattels seized by him under the said writ of *fi. fa.*

On the 25th January 1892, the said sheriff, by order of
ustice Hood made herein, dated the 19th January 1892, sold
d stock-in-trade, goods, and chattels as aforesaid claimed by
d Samuel Henry Cohen as assignee, and the same realised
m of 239*l.* 8*s.* 6*d.*, which he now holds in place of the said
n-trade, goods, and chattels as aforesaid.

e question for the opinion of the Court is whether the
ff is entitled to a charge or security upon or in respect of the
m of 239*l.* 8*s.* 6*d.*, the proceeds of the said stock-in-trade,
and chattels sold by the said sheriff to the extent of his said
ent debt, and whether he is entitled to have such proceeds
ver to him accordingly.

the Court shall be of opinion that the said Samuel Henry
as such assignee as aforesaid is entitled to the said sum of

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239*l.* 8*s.* 6*d.*, free from any charge or security thereon in favour of the plaintiff as aforesaid, then judgment shall be entered up for him on the special case herein for 239*l.* 8*s.* 6*d.* and his costs.

If the Court shall be of opinion that the plaintiff is entitled to the said charge or security, or to have the said proceeds paid over to him, then judgment shall be entered for the plaintiff on the special case herein for 239*l.* 8*s.* 6*d.* and his costs.

Bryant for Thomson (the execution creditor) the plaintiff—Thomson is a secured creditor within the meaning of sec. 67, sub-sec. 5, of the *Insolvency Act* 1890. The writ of attachment and the seizure by the sheriff bring him within that sub-section. In *Watson* v. *Morrah* (*a*) it was decided that a creditor who had served a garnishee order *nisi* was a secured creditor. In *Lauratet* v. *McCracken* (*b*) it was held that property attached by a writ of foreign attachment passed on insolvency to the official assignee. The word "levied" in sec. 104 of the *Supreme Court Act* 1890 means seizure without sale. Sec. 104 of the *Supreme Court Act* 1890 makes an exception to the operation of sec. 76 of the *Insolvency Act* 1890, which places property seized and not sold in the same position as other portions of the insolvent estate.

Counsel also cited: *In re Kennedy exparte Tatterson* (*c*); *Levy* v. *Lovell* (*d*); *Exparte Sears in re Price* (*e*).

Higgins for the assignee in insolvency—All the rights of the judgment creditor under the writ of attachment are swept away after sequestration. The words of sec. 76 of the *Insolvency Act* 1890 are clear and conclude the whole matter.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. We think that the question raised by this special case is determined by the language of section 76 of the *Insolvency Act* 1890, which provides that—

"Further execution of any judgment or process against the person or property of an insolvent shall, after an order of sequestration of such estate has been made, be stayed, and the person having right to such judgment may prove his debt against the insolvent estate; and where any property has been seized or attached by legal

(*a*) 6 V.L.R. (L.) 134.
(*b*) 3 V.R. (L.) 41.
(*c*) 13 A.L.T. 227.
(*d*) 14 Ch. D. 234.
(*e*) 17 Ch. D. 74.

s and has not been sold, such property shall be placed under sequestration in ne manner as any other part of the insolvent estate."

sec. 77 provides that—

ny creditor who shall be prevented by the sequestration of the debtor's from proceeding to sell under an execution levied before the order of seques- was made shall be entitled to be paid his taxed costs incurred in the action, other proceedings under which such execution issued out of the proceeds of olvent estate, but no such payment shall exceed 50*l*."

the case of an ordinary judgment creditor, there can be no as to the meaning and effect of these words of the *Insolvency* If the judgment creditor has proceeded to the stage at which rit of execution has been issued and the property seized but ld, the action is stayed, and all the property seized is applied benefit of all the creditors, including the execution creditor, s enabled to recover his costs up to a certain amount. We there is no distinction created by the fact that in the present ndgment was preceded by a writ of foreign attachment under *upreme Court Act* 1890. We think there is no ground for that there is any distinction whatever. The words of the *ency Act* are too plain to permit of any doubt on the subject. rgument proceeded upon certain words which appear in the ent in the case of *Lauratet* v. *McCracken* (*f*), words not free from obscurity, and upon the meaning to be attached to ord "levy" in sec. 104 of the *Supreme Court Act* 1890. not think it necessary in the present case to deal with either ords referred to in that decision or the construction of 04. Whatever may be the meaning of the words "execution " in sec. 104 of the *Supreme Court Act* 1890, we think that rms of the *Insolvency Act* cover the facts of this case, and o distinction is created by the fact that the writ of foreign ment preceded the obtaining of the judgment and the issue writ of execution. We therefore answer the question that el Henry Cohen, as such assignee, is entitled to the sum of 8*s*. 6*d*., free from any charge in favour of the plaintiff, and ent will be entered accordingly.

licitors for plaintiff: *Cohen, Pavey & Wilson.*
licitors for defendant: *Braham & Pirani.*

A. F. M.

(*f*) 3 V.R. (L.), p. 45.

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1892
June 15.

FORAN *v.* DERRICK.

Defamation—Evidence—Public policy—Objection to produce by head of public department—Secondary evidence.

Where a person who as Minister has charge of a document, and who is qualified by his position to have an opinion whether the production of the document would be objectionable on the ground of public policy, objects on this ground to produce it, the Court will determine the question of admissibility by reference to the opinion of the Minister.

The proper mode in which objection to produce such a document should be made is for the Minister to attend in Court and state his objection. If a Minister instead of attending himself sends a subordinate to Court to object to produce the document, this mode of taking the objection, although irregular, may be accepted by the Court.

If the original document cannot be produced on the grounds of public policy, secondary evidence of its contents cannot be given.

APPEAL from County Court.

The plaintiff appellant sued the respondent for libel, claiming 500*l.* as damages. The defences raised in the Court below were: (1) No publication; (2) Privilege; (3) Justification on the ground that the statements complained of were true. When the alleged cause of action arose, the defendant was a head teacher at a State school, and the plaintiff was an assistant teacher in the same school, and the alleged libel was contained in a letter written by the defendant to the Education Department charging the plaintiff with committing improper acts in the discharge of his duties as a teacher. At the hearing the plaintiff applied for the production of this letter from a witness whom he called—the Secretary of the Department for Education—who stated he had the letter in his possession. The witness, however, refused to produce the letter on the ground of public policy, under special instructions from the Minister of Education. The plaintiff then applied to be allowed to give secondary evidence of the contents of the letter, but the learned judge of the County Court held that such secondary evidence was inadmissible; the plaintiff thereupon applied for a nonsuit, and the learned judge nonsuited him accordingly. The plaintiff then obtained an order *nisi*, calling on the defendant to show cause why this decision should not be set aside on the grounds that the judge of the County Court was wrong

in holding that the letter should not be produced on the ground of public policy, and that secondary evidence of its contents was inadmissible.

Box, for the respondent to show cause, was stopped by the Court, after having stated the facts.

The appellant in person to move the rule absolute—I elected to be non-suited in deference to the opinion of the learned judge, but that does not prevent the non-suit from being a matter of appeal: *Davidson* v. *Brown* (*a*); *Harvey* v. *Shire of St. Arnaud* (*b*); *Griffin* v. *Ross* (*c*); *O'Malley* v. *Elder* (*d*). As to the admission of secondary evidence of the letter: *Stephen's Digest of the Law of Evidence*, art. 72; *Stowe* v. *Querner* (*e*). As to the exclusion of the document on grounds of public policy: *Spitzel* v. *Beckx* (*f*); *Taylor on Evidence*, pp. 819, 820.

HIGINBOTHAM, C.J. This was an order *nisi* to show cause why an order made by Judge Hamilton in the County Court at Melbourne, on the 27th of April last, whereby the plaintiff was nonsuited, should not be set aside. The order *nisi* was obtained on two grounds—first, that the learned judge in deciding that the document containing the libel on which the action was based should not be produced on the grounds of public policy was wrong; and, secondly, that the decision of the learned judge that secondary evidence of its contents was inadmissible was wrong.

The action was brought by the plaintiff against the defendant for libel, and the plaint set forth certain allegations alleged to be libellous which were made by the defendant of the plaintiff. The plaintiff, in proving his case, found it necessary to produce a certain letter addressed by the defendant to the Department of Education, that being the letter upon which the allegations in the plaint were based. The plaintiff called as a witness Mr. G. Wilson Brown, who had been a previous secretary to the Board of Education. He did not produce the letter. The plaintiff

(*a*) 5 V.L.R. (L.) 288.
(*b*) 5 V.L.R. (L.) 312.
(*c*) 11 V.L.R. 183.
(*d*) 2 V.L.R. (L.) 39.
(*e*) L.R. 5, Ex. 155.
(*f*) 16 V.L.R., p. 664.

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then called Mr. Thomas Brodribb, the present secretary, wh
this statement:—"I have the letter in my possession, and
to produce it. I refuse to produce it on grounds of public
by special direction of the Minister of Education." The
judge upheld the objection taken by this witness, and ref
compel the witness to produce the document then in his pos
and the question we are first called upon to determine is
the decision of the learned judge refusing to compel the wit
produce the document called for by the plaintiff was or
wrong. We are of opinion that the learned judge's
was correct. This was a document apparently of a
nature, but it was not a document which could be p
and used by a party in a suit in support of hi
There are several classes of public documents which
admissible, although they may be evidence relevant to th
between the parties to the suit—amongst others, documen
public nature, the production of which is objected to on the
of public policy. Such documents cannot be called for or
evidence by a party to the suit who seeks to support his
their production. And when a question of this kind is
ordinarily it is for the Court to determine whether the do
on which this privilege is claimed is or is not proper to be a
in evidence. In the case of a document of a public nature
to be produced on the ground of public policy by a person w
charge of the document, and is qualified by his position to
opinion upon the subject whether the production of the inst
would or would not be objectionable on the ground of public
the Court will determine the question of admissibility by re
to the opinion of the officer who has charge of the instrume
whose duty it is to inform the Court of his opinion wheth
production of the instrument is or is not objectionable. T
on this subject is laid down in the case of *Beatson* v. *Sk*
where the Court says:—

"It is manifest it must be determined either by the presiding judge o
responsible servant of the Crown in whose custody the paper is. The judge
unable to determine it without ascertaining what the document was and
publication of it would be injurious to the public service—an inquiry whic
take place in private, and which taking place in public may do all the mischi

(*g*) 5 H. & N., p. 853.

it is proposed to guard against. It appears to us, therefore, that the question whether the production of the documents would be injurious to the public service, must be determined, not by the judge but by the head of the department having the custody of the paper, and if he is in attendance, and states that, in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community. If, indeed, the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or, as was the case in *Dickson* v. *The Earl of Wilton*, before Lord Campbell (reported in *Foster and Finlayson's N.P. Rep.*, p. 45), where a subordinate was sent with the document with instructions to object but nothing more, *the case may be different.*"

This latter observation shows the particular mode in which the objection to produce the document should be made, and it is undoubtedly the most proper and correct course that the Minister and head of the department in which the document is kept should attend in Court and state to the Court his objection to the production of the document. That course has been not infrequently taken in England, and it is undoubtedly the proper and most regular mode in which a Minister can convey to the Court his objection to produce the document. That mode was followed in the case of *Dickson* v. *The Earl of Wilton*, referred to in the above extract, where Lord Campbell ruled that the privilege of refusing to produce a document is personal to the head of the department in whose possession the document is. It was also followed in a case before Lord Coleridge, reported in *The Times* newspaper, 9th November, 1877, where Lord Coleridge said that he could only receive a statement to that effect from the Minister himself (Lord Derby), and Lord Derby attended in accordance with such ruling, and from a seat on the bench he submitted that it would not be to the interest of the public service that any of the documents should be produced, whereupon Lord Coleridge held that the objection was conclusive.

In the present case the most proper form of taking this objection was not pursued. The Minister did not attend and state to the Court his objection to the production of the document. He instructed the secretary of the department to attend, and the secretary attended and refused to produce the document on the ground of public policy, and by the special instruction of the

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Minister of Education. That formal objection, though irr
and though it might have been disregarded by the Court, ina
as the Court might have required the Minister to att
compelled his attendance, or might have compelled the se
to produce the document, was a form of taking the objection
was sufficient to convey to the mind of the Court that the M
did personally object to the production of the document
ground stated. And we think that the learned judge was at
to accept this irregular mode of taking this objection.
accept this procedure, and the objection by the Minister
been conveyed to the mind of the Court, the Court was bo
treat it as conclusive, and it was not for the Court to ju
itself whether this document was or was not one which,
ground of public policy, ought not to be produced. We thi
decision of the learned judge on that point was not erroneou

The second objection was that the decision of the learne
that secondary evidence of this document was inadmissibl
wrong. We are of opinion that that decision also was rig
the original document could not be produced, then sec
evidence of its contents could not be given. When an
document is not produced on certain grounds secondary e
can in many cases be given, but when an original document
be used in evidence at all on the ground that its production
be against public policy, in such a case secondary evidence
not be given of its contents, because the admission o
secondary evidence would defeat the purpose for which the
to exclude the original document is given. We think, th
on both these grounds on which the order *nisi* is found
decision of the learned judge was correct.

The plaintiff has urged that he submitted to a non
deference to the opinion of the learned judge, and
referred to several decisions to show that where a
submits to be nonsuited in deference to the opinion
judge that there is no case to go to the jury, he
precluded from afterwards objecting to that nonsuit. Bu
cases do not apply to the present case, as here the opi
the judge was not that there was no case to go to the jury, b
the plaintiff could not compel the production of the documen

which the plaintiff's case was founded, and the plaintiff thereupon elected to be nonsuited. There was no other course open to the plaintiff to take, but it was not a case in which a nonsuit was imposed upon the plaintiff by force of and in deference to the judge's opinion. We think that the decision of the learned judge on these points was correct, and the appeal must be dismissed.

HOLROYD, J. The learned judge held that he could not direct the letter to be produced, because the secretary of the Education Department stated that he had been instructed not to produce it. The Minister did not send the secretary to the Court to submit to the Court whether the letter should be produced or not; if he had done so, although instructing the secretary to object to the production of it, the case might have been different. This case is a mean between two extreme cases, one where the Minister attends personally and states that he refuses to produce the document on the ground of public policy, the other where he does not attend, but by the mouth of his officer submits to the decision of the Court in any manner whatever. Here he sent a subordinate to say for him that which he might more correctly have said for himself, viz., that he would not produce the document. I do not go so far as to say that if the Minister had refused to produce the letter the learned judge could have compelled him to produce it. In the present case no exception was taken to the mode in which the objection was conveyed to the Court, and I am of opinion that the learned judge was perfectly right.

HODGES, J. I concur.

Solicitor for the defendant respondent : *Guinness*, Crown Solicitor.

A. F. M.

F.C.

1892
June 21.

ESSENDON LAND, TRAMWAY, AND INVESTMENT CO. *v.* BROWN.

Appeal from County Court—The County Court Act 1890 (*No.* 1078), *s.* 134—*Appeal from decision in Chambers—Summons, irregularity in—Practice.*

Where a party seeks to appeal under the provisions of sec. 134 of Act No. 1078, from the decision of a judge of the County Court, whether such a decision be in an action or in a proceeding in Chambers, it is necessary that the judge should be requested to take a note of the point of law raised, and of the facts in evidence in relation thereto, and of his decision thereon.

The service of a summons on a day subsequent to the day on which a party is directed to appear is a bad service, and a judgment obtained on such a summons will be set aside.

APPEAL from County Court.

The plaintiff company took out a special summons under sec. 64 of the *County Court Act* 1890, for the recovery of 111*l.* 19*s.* 8*d.*, money alleged to be due for calls. The summons was dated the 25th February 1892, and was served on the defendant on the 28th February, and it directed the defendant to appear on the 1st of February 1892. In the body of the summons (*inter alia*) was a notice to the defendant that, unless within ten clear days of service he gave notice to the registrar of his intention to defend the action, judgment would be signed against him. The defendant regarded the summons as bad, as it directed him to appear on a day already past, and took no steps to enter a defence, and, on the 16th March, judgment was signed against him, of which he received due notice from the registrar. He then took out a summons to have the judgment set aside, but the learned County Court judge who heard it, dismissed it on the ground that the discrepancies in the dates of the copy summons served upon the defendant were mere clerical errors, and that as the defendant had been warned by the summons that unless he gave notice of his intention to defend the action within ten days after service, judgment would be signed against him, and, as he had taken no steps to comply with such notice, he had waived his right to object. From his decision the defendant appealed by way of order *nisi*, under sec. 134 of the *County Court Act* 1890. At hearing of the appeal all the materials that were used at the hearing of the summons in Chambers were brought before the

Court, as also the order of the judge dismissing the summons, but it appeared that the judge had not, at the hearing of the summons, been asked to make a note of any question of law raised nor of the facts in evidence in relation thereto nor of his decision thereon.

Anderson, for the defendant appellant, moved the order *nisi* absolute.

McArthur, for the plaintiff respondent, showed cause—There is a preliminary objection to this appeal. It is an appeal under sec. 134 of the *County Court Act* 1890. That section requires that the judge shall be required to take a note of any question of law raised and of the facts in evidence thereto, and of his decision thereon. The authorities show that this is a condition precedent.

[HOLROYD, J. We have the affidavits that were used at the hearing below, and the judge's order thereon.]

There is no note of the question of law relied on. If a party takes advantage of this section, he must follow its terms. Either this section does not give parties a right to appeal under its provisions from orders in Chambers, or, if it does, they must be in the mode prescribed by the second part of the section. The whole section must be read together: *Jones* v. *Ebsworth* (*a*); *Schofield* v. *Duguid* (*b*).

Anderson in reply—Sec. 134 seems to distinguish "action" and "proceeding or order of a judge." The words "of such court" refer to something done in the County Court. The words "any order of a judge thereof" refer to orders in Chambers. The mode of procedure laid down by the second part of the section does not refer in any way to appeals from orders in Chambers. The materials are all before the Court. The point of law raised is that this summons was bad; the affidavits used in the summons to set aside the judgment and the judge's decision on that summons are all before the Court.

[HOLROYD, J. We have all the materials, but not in the proper form.

(*a*) 13 V.L.R. 346. (*b*) 16 V.L.R. 618.

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ESSENDON, LAND, TRAMWAY, AND INVESTMENT CO. v. BROWN.

HIGINBOTHAM, C.J. We have not the only thing th Court can look at, viz., the judge's note.]

Where all the requirements of the section, though not ing to the strict literal meaning, are complied with the Cou entertain the appeal: *Seymour* v. *Coulson* (*c*).

HIGINBOTHAM, C.J., delivered the judgment of the [HIGINBOTHAM, C.J., HOLROYD, and HODGES, JJ.]. We are to yield to the preliminary objection taken in this case. Se of the *County Court Act* 1890 cannot be construed consi unless the words in the first line of the section which descri subject matter in respect of which a party is given a right of are construed to apply all through the section. In the mi the section only some of the words, viz., "at the trial or *of any such action* in a county court" are used, but we opinion that the words "action, suit, matter, or other proce govern the whole section. We do not think that this secti receive a consistent meaning, unless we hold that the words matter, or other proceeding" are inserted after the word "a in the thirteenth line of the section, and also whenever th "action" occurs in the subsequent part of the section. if such an addition is necessary in order to give a con interpretation to the whole section, then it would follow party to any proceedings is bound, at the trial or hearing seeks to appeal under this section, to request the judge to n note of any question of law raised, and of the facts in evid relation thereto, and of his decision thereon. In this case materials do not exist, and the defendant is seeking to against a decision of a judge on a proceeding in which the def sought to set aside a judgment recovered against him, a failed to provide himself with the proper materials for app under this section. It is not necessary for our decision that we review the grounds of the learned County Court judge's de but it is proper to say that we have no doubt whatever copy of a summons such as this, that was served on the defe was not a service of a summons at all, and if the proper

(*c*) 5 Q.B.D. 359.

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been taken in order to protect the defendant from the consequences of this wholly irregular service, he would have been entitled to have had this judgment set aside. But as he has not taken the proper steps for appealing, and as this is a decision upon preliminary objection, and not upon the merits of the case, the *nisi* will be discharged, but without costs.

Solicitors for the defendant appellant: *Anderson & Son.*
Solicitors for the plaintiff respondent: *Pentland, Roberts & Simpson.*

W. H. M.

McDADE *v.* HOSKINS AND ANOTHER.

F.C.
1892
June 22, 23, 25.

Evidence—Damages—Assessment of damages by jury, direction as to—Evidence.

In an action for injuries caused by the negligence of the defendants, the plaintiff entitled to receive full compensation for all pecuniary loss, past and future, but jury should be directed, in assessing the damages in respect of future pecuniary loss, to take into consideration all the contingencies connected with the probable duration of the plaintiff's injuries and all the uncertainties which attach to and involved in the chances and accidents of his future life, and as to future loss that compensation is to be a present equivalent.

THIS was a motion by the defendants in the action, for a new trial on the grounds, *inter alia*, of wrongful admission of evidence and misdirection as to damages. The action was for damages for injuries received by the plaintiff (who was in the employ of the defendants) while he was engaged in knocking a drift out of a pipe on which he was working. The pipe was hanging by a wire rope which was attached to a drum on a crane. A spindle passed through this drum, and was kept fast by a flat key inserted to keep the drum from slipping round and round the spindle. This key, the plaintiff alleged, was improper for its purpose, and by reason of defective construction the drum slipped, and the pipe, which was loaded with a hot ring, fell on the plaintiff's arm and injured it so severely that his arm had to be amputated.

The defences set up by the defendants were a denial of negligence, and an allegation of contributory negligence in that the

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plaintiff had put his arm inside the pipe wrongfully, and ha neglected to place underneath the pipe a wooden block for prot in the event of the pipe falling. Further, that the acciden one of the ordinary risks of the plaintiff's employment, and that it occurred through the negligence of the plaintiff's workman, and the defendants, without admitting any liability 250*l.* into court. At the hearing, Searles, one of the plai witnesses, who had been employed by the defendants' for Langston, to put the crane together and erect it, stated that he was putting up the crane he told the foreman that there to be flat keys sunk in the spindle. This evidence was object but was admitted. The jury returned a verdict for the pl and assessed the damages at 1,750*l.* 12*s.* The mode in whic sum was arrived at is set out in the judgment. Judgment fo amount was entered up for the plaintiff. The defendants moved for a new trial on the grounds above stated.

Madden and *Kilpatrick*, for the defendants, in support motion—The evidence of the witness Searles, that at the ti machine was being constructed he had expressed an opinio the key should be sunk in the spindle to a person in the defe employ, was not admissible against the defendants. It gratuitous opinion, in no way binding on the defendants. It statement which, once admitted, would greatly influence the of the jury. Counsel referred to *Dodd* v. *Dunton* (*a*); *Gi McMullen* (*b*). The damages have been assessed upon a basis. The judge should have directed the jury upon the qu of future damages as distinguished from damages already inc their attention should have been drawn to numerous contin which would probably arise in connection with the plaintiff's ing on his occupation during the remainder of his life. Th apparently fixed the damages on some mathematical calcu and the cases are clear that the jury are not to go into ac calculations: *Phillips* v. *London and South-Western Railway Armsworth* v. *South-Eastern Railway Co.* (*d*); *Rowley* v. *L*

(*a*) 16 V.L.R. 531.
(*b*) L.R. 2 P.C., p. 340.
(*c*) 4 Q.B.D. 407.; 5 Q.B.D. 7
(*d*) 11 Jur. 758.

North-Western Railway Co. (*e*); *McLean* v. *Board of Land Works* (*f*).

uffy and *Power*, for the plaintiff, to oppose the motion—It is ecessary to discuss whether this evidence given by Searles was perly admitted or not, because the whole of it was given by witnesses in other parts of the case.

Hodges, J. Such other evidence related to a time after the ning of his accident, and that is very different from evidence tatement made at the time when this machine was being ucted.]

ven supposing this evidence was improperly admitted, there o much other evidence that flat keys were improper in a ne of this kind, that the jury would not have been likely to been misled by this one piece of evidence, and the Court will rect a new trial where evidence, though improperly admitted, not affect the minds of the jury: "*Rules of the Supreme* 1884," Order XXXIX., r. 4. In any aspect, it was evidence ngston's incompetency. Langston was the defendants' sole ger in Melbourne, and was the defendants' agent to make this sion. Assuming that the evidence is improper in one aspect, admissible in another its admission is not a ground for a rial: *Litton* v. *Thornton* (*g*). The question which elicited nswer from the witness was a proper one, and if the question per, then the answer to it is admissible. Taking Langston e agent of the defendants, the evidence was admissible: r *on Evidence* (8th ed.), Vol. I., 553. Then it was evidence ove Langston's incompetence, as acts of negligence show petence.

Higinbotham, C.J. Negligence and incompetence are two ct things.]

showing acts of negligence, the jury are at liberty to infer petence; it is the only way incompetence can be proved. ton was the defendants' manager; he employed Searles and an to erect this machine, and he was supervising the

(*e*) L.R. 8 Ex. 231. (*f*) 7 V.L.R. (L.) 239.

(*g*) 7 V.L.R. (L.) 4.

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construction of it; and if it is pointed out to such a person that it is not being properly constructed, and he does not advise an alteration, that shows either negligence or incompetence on his part: *Murphy* v. *Pollock* (*h*); *Beven on Negligence*, 359.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. We regret very much that a new trial must be ordered in this case upon two of the grounds on which it has been applied for. The first ground is the wrongful admission of the evidence of the witness Searles. That was evidence for the plaintiff, and the witness was asked a question, which was objected to, and to which he returned the following answer. After saying that he thought flat keys were not safe, he said: "I thought so at the time, and I said, Jack, there ought to be key seats sunk in that spindle; he said, Flat keys are used in the Sydney shop." Now the answer to that question involved two pieces of evidence. First, a statement by Langston to Searles that a flat key was the mode adopted in the Sydney shop, and it may be that Langston should be regarded as the agent of the defendants to make that statement; and in that view that statement by Langston would be admissible. The second piece of evidence involved in the answer was an opinion previously expressed by Searles, not binding on the defendants, that there ought to be key seats sunk in the spindle. We do not think that that evidence was admissible against the defendants from a person in the position occupied by Searles in this case. He was one of the two persons appointed to construct and erect this machine, but it does not appear that he had anything to do with the designing of it, and this is an opinion expressed, not in the witness box or to the defendants, with regard to the design of the shaft and of the key connected with the shaft and the barrel. We should be glad if it were possible to regard this as evidence such as often finds admission in the course of a trial, and which might not be calculated to affect the judgment of the jury; but we think that this opinion, bearing in mind the time and the circumstances under which it was expressed, could not fail to have a great effect upon the jury. We

(*h*) 15 Ir. R. (C.L.), 224 at p. 232.

ive that substantial wrong has been done by the admission of statement, and therefore we are not at liberty, under the rule e Court, to disregard the objection.

nother ground of this motion is that there has been a mis- tion as to damages. Now the rule as to damages in cases is kind is clearly settled by numerous decisions in this Court, ving an approved decision of a Court of Appeal: *Phillips* v. *h-Western Railway Company* (*i*). The rule is this—There wo elements of damage in the case of a person who sues ner for negligence involving personal injury. First, the tiff is entitled to consolation, as it is called, for the physical and suffering which he undergoes. Physical pain and suffer- s something for which no adequate compensation can be given, therefore the law lays down no rule with respect to this ent of damage except this, that the jury is to give what seems em to be such a sum as shall be, not compensation, which ot be given, but a reasonable consolation for the physical ring which the plaintiff undergoes.

second element of damage is the pecuniary loss which a n injured by an accident of this kind is compelled to undergo, loss being partly past when the case comes to trial and partly e. Past loss is to be an element in the consideration of the ges under this head, and it includes all expenses that the ed person has reasonably incurred in endeavouring to obtain from his pain and injury. But he is also to receive a present alent for all future pecuniary loss, and in the estimation of future loss all the contingencies are required to be considered, such contingencies are very numerous, and depend on the mstances of each case. Future pecuniary loss may be limited obable duration, or it may be likely to extend to the very end ne injured person's life, and the jury have to arrive at an nt proper to be awarded to him by a careful consideration of ne contingencies connected with the probable duration of his y, and all the uncertainties which attach to and which are ved in the chances and accidents of his future life. Subject to contingencies he is to receive full compensation for all niary loss past and future by means of a present money

(*i*) 5 Q.B.D. 78.

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equivalent. Now it has been contended by the defendants i
case that there has been a misdirection as to damages. W
carefully considered the report furnished to us of the l
judge's direction upon this point to the jury, and we think th
charge to the jury omits a sufficient direction to them t
into consideration all the contingencies connected with futu
to which the plaintiff would be liable as the result of his
The learned judge does not go into particulars as to the con
tions which the jury are in cases like the present bound to
tain, and ought to be advised to entertain, in estimating this
pecuniary loss, and we think that in that respect, by
omission, this charge is open to the objection of misdirecti
non-direction in this case amounts to a misdirection, and tha
is strengthened by a reference to the actual findings of the j
the question of damages. The jury have given particul
damage, and it is not easy to find satisfactory reasons to s
the contention that these particulars are founded upon th
sideration of all the various contingencies that should have
considered by the jury in this case. The jury have found 49
at 48 shillings, 117*l.* 12*s.* That appears to be loss of wages
the time of the trial. That head can be understood. Ther
is a finding of 52 weeks at 20 shillings, 52*l.* What that re
it is difficult to understand. The next finding is 1,081*l.*,
compensation for future pecuniary loss. Why that is sep
from the 52 weeks at 20 shillings does not appear. Th
finding is consolation, 500*l.* The jury evidently gave close att
to the question of damages, and worked it out in some
other; but they have stated the particular amounts at which
arrived, and we fail to see that their particular conclusion
founded upon a due consideration of all the contingencies
they were bound to take into consideration with reference to
future prospects of the plaintiff in regard to his ability to ca
the industry in which he was engaged. I do not say that th
have not done so, but the particulars of their findings do not
us that they have done so. We think that the learned
omitted to call their attention as distinctly as he should have
to all the contingencies connected with this case, and that,
the circumstances of the case, this was an omission which amo

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to a misdirection. The learned judge pointed out to the jury the difference between the wages which the plaintiff had been earning, and the wages which he could earn, but he did not point out the fact that future compensation is to be estimated on the basis of a present equivalent, and that is a very important element in cases of this kind. We, with great regret, have come to the conclusion that the motion for a new trial must be allowed with costs. The costs of the last trial will abide the event of the new trial.

Solicitor for plaintiff: *Hopkins.*

Solicitors for defendants: *Lynch, McDonald, Stillman & Keep.*

W. H. M.

MERRY *v.* THE BOARD OF LAND AND WORKS.

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June 20, 21, 22.

Practice—Summons, copy signature of judge to be attached thereto—Jurisdiction—Second summons in same action—Recital of affidavits in order of judge—Irregularity—Res judicata—Abuse of the process of the Court.

A judge is not deprived, by the fact that a previous summons has been taken out to amend the pleadings, of jurisdiction to determine the subject matter of a different summons asking for a different thing in the same action.

A defendant took out a summons calling upon the plaintiff to show cause why the statement of claim should not be struck out or amended on the ground that it was embarrassing. This summons was dismissed. The defendant afterwards took out another summons to strike out the statement of claim and dismiss the action on the ground that it was an abuse of the process of the Court, and that the subject matter of the action had already been decided. The judge in Chambers granted the application.

Held, on appeal that the judge had jurisdiction to entertain the second summons, and that the order dismissing the action was good.

A copy summons served on a party ought to be a true copy, and if the signature or copy signature of the judge attached to the original summons does not appear on the copy served, that is an irregularity. *Rudduck* v. *Clarke* (6 A.L.T. 46) not followed.

Where an order of a judge in Chambers recites the affidavits filed by the defendant but omits to recite the affidavits filed by the plaintiff in answer, such omission constitutes an irregularity merely, which may be dealt with by the Court when considering the question of costs.

The plaintiff by his statement of claim claimed damages from the defendant for having uttered a forged attested copy of a certain deed. In a previous action by the same plaintiff against Her Majesty and the present defendant and others, it had been found as a fact by the judge who tried the action that the plaintiff was a party to the original deed, and that the same had been signed by the plaintiff.

Held, that the matter was *res judicata*, and that the second action should be dismissed as being an abuse of the process of the Court.

THIS was an appeal from an order of Hood, J., ordering the plaintiff's statement of claim to be struck out, and the action to be

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dismissed and judgment to be entered for the defendants with costs, on the ground that the action was an abuse of the process of the Court, in that the issues raised had already been adjudicated upon in an action brought by the plaintiff against Her Majesty the Queen. From this order the plaintiff appealed on the grounds that (1) a previous order made on a summons calling upon the plaintiff to show cause why his statement of claim should not be struck out or amended on the ground that it was embarrassing to a fair trial of the action was a bar to the summons on which the order appealed from was made; (2) that the copy summons served on the plaintiff did not bear the name of the judge which was attached to the original summons; (3) that a number of exhibits (seven) were referred to in defendants' affidavit in support of the summons, none of which were served on the plaintiff; (4) that the order appealed from recites the affidavits of the solicitor for the defendants but does not recite the affidavits of the plaintiff filed in answer; (5) that the order appealed from was bad in law.

The appellant in person in support of the appeal—There have already been four orders made on the one writ. The summons on which this order was made was informal, inasmuch as the copy served upon me was not signed. I attended on the return day of the summons, not in answer to the summons, because I considered it bad, but for the purpose of objecting to it. Another objection is that the affidavit in support of the summons alludes to seven exhibits which were not served on me. Then there was a previous summons taken out by the defendants for the purpose of striking out or varying the statement of claim. Molesworth, J., dismissed it. That order was not appealed against, and I submit that the defendants had no right to take out this second summons while that order by Molesworth, J., remains in force. Then again subsequently to the order made by Molesworth, J., the defendants applied to me for an extension of time for the delivery of their defence and I consented. That amounted to a waiver by the defendants to any objection that might be raised to my statement of claim.

Box for the defendant respondent—The summons which was dealt with by Molesworth, J., was a summons for the purpose of

obtaining an amendment of the statement of claim in order that it might be put into language that a pleader could answer. The summons of the 14th December, on which the order now appealed from was made, was to strike the action out altogether, on the ground that it was an abuse of the process of the Court. This summons was signed by the Chief Justice, and it is objected that the copy delivered to the plaintiff bore no copy signature. *Rudduck* v. *Clarke* (*a*) is an authority that a summons need not be signed by a judge or his associate. In any aspect, however, the plaintiff appeared to that summons, which was adjourned until after the vacation, and that adjournment being granted, Hood, J., directed that the plaintiff should have notice of the time when it should come on again. That notice was served on the plaintiff and the plaintiff appeared. That appearance waived any such objection as that now relied on.

[HIGINBOTHAM, C.J. An irregularity of this kind might be a ground for an adjournment, and consequently merely a question of costs.]

With reference to the non-service on the plaintiff of the exhibits mentioned in the affidavit of the defendants' solicitor, they would all of them be in the possession of the plaintiff, as they were documents used in a prior suit by the plaintiff against Her Majesty, and further, there is no rule that requires the service of exhibits on the other side. Then as to the main point, that the issue raised by this statement of claim is *res judicata*—The issue raised is that the defendants forged the plaintiff's signature to a certain deed called a deed of substitution dated 28th March 1860. In the original action of *Merry* v. *The Queen* (*b*) Higinbotham, C.J., in giving judgment, found as a fact that that deed had been executed by Merry, and that a true copy of it was put in evidence, and that judgment was affirmed on appeal.

[HOLROYD, J. Ought you not to have pleaded *res judicata*?]

Not necessarily in a case of this kind.

[HIGINBOTHAM, C.J., referred to the *Supreme Court Rules*, Order XXV., proceedings in lieu of demurrer.]

The Court has, apart from the rules, an inherent jurisdiction to strike out an action where it is an abuse of the process of the Court:

(*a*) 6 A.L.T. 46. (*b*) *Argus* Reports, 19th Nov., 1889.

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Supreme Court Act 1890, sec. 62, sub-sec. 5; *Annual Practice* 1892, p. 23. This jurisdiction is not limited by Order XXV., r. 4: *Macdougall* v. *Knight* (*c*); *In re Wickham* (*d*).

The appellant in reply.

Cur. adv. vult.

June 22.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. This is an appeal from an order of Hood, J., ordering the statement of claim to be struck out and the action to be dismissed, and judgment to be entered for the defendants with costs, and that the plaintiff pay to the defendants the sum of three guineas costs of the application.

The plaintiff has appealed on several grounds from this order. His first ground of appeal is that a previous order had been made upon a summons taken out by the defendants calling upon the plaintiff to show cause why the statement of claim should not be struck out or amended on the ground that it was embarrassing to a fair trial of the action. That summons was taken out on the 1st of December last year, and was heard by Molesworth, J., who dismissed it with costs. It is objected by the plaintiff that the decision of the learned judge on that summons was a bar to the hearing of the second summons, on which the order now appealed from was made. It may be assumed to be the intention of our rules with regard to pleadings that objections to the form and substance of pleadings should not be taken at different times unnecessarily. But there is no rule which prevents a party who has failed in one summons to obtain an amendment of pleading, bringing a second summons for a different purpose asking for a different thing, and prosecuting that second summons to its legitimate conclusion. A judge is not deprived, by the fact that a previous summons has been taken out to amend the pleadings, of jurisdiction to determine the subject-matter of a different summons asking for a different thing. The circumstances of this case as they have been stated to us, show that the party who took out the second summons was under some embarrassment, and might not have been prepared at the time the first summons was taken

(*c*) 25 Q.B.D. 1. (*d*) 35 Ch. D., p. 280.

support the objections afterwards taken to the statement of

The second summons had an entirely different object from rst summons. The first was to correct the embarrassing f the plaintiff's statement of claim, the second aimed at g out the statement of claim and dismissing the action ther. The second summons was taken out on the 14th of ber of last year. It appeared that the copy served upon the ff did not bear the name of the judge which was attached to ginal summons, and it was objected in the second place by the ff that this also deprived the judge, who firstly dealt with the ons on the 4th of February, of jurisdiction to deal with it. ontended by the plaintiff, and we think properly, that the ummons served upon a party ought to be a true copy, and if nature or copy signature of the judge attached to the original ons does not appear on the copy served, that would be an arity. We have been referred to a case of *Rudduck* v. *Clarke* (*e*), was decided on this point, and we think it proper to state that not concur in the decision in that case. It was decided there e copy of the summons served need not be signed with the f the judge attached to the original summons. That decision sed on the form provided for a summons in Appendix K to es. Appendix K does not provide for the name of a judge he signature of a judge, and it was held upon this ground copy signature need not be attached to the copy summons. rm in Appendix K contains no blank for the judge's signa- either does the form of the order founded on the summons Appendix K provide for the signature of the judge, but it ot be contended that the absence of a blank for the signature ndicate that the original order need not be signed by the and consequently such absence from the original form would thorise the omission of the signature in the copy. And ch as the original summons requires the signature of a whether it be his autograph or signature by his associate, we nat that which purports to be a copy of the summons ought true copy, and ought therefore to bear the copy signature of ge who signed the summons. We think that this was an arity, and we do not say that if the plaintiff had failed

(*e*) 6 A.L.T. 46.

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to appear on the second summons a valid order could have been made against him in his absence. The plaintiff, however, prepared his affidavits in answer to this summons, and at the hearing appeared before A'Beckett, J., on the 21st December, and he there mentioned this objection and relied upon it as a substantial objection to the hearing of the summons by the judge. An order was then made postponing the hearing until after vacation, at the beginning of February, and the learned judge directed that the plaintiff should be served with a written notice of the day on which this summons would be heard, and reserved to the plaintiff all the rights of objection relied on. The plaintiff appeared in February before the judge who made the order now appealed from, and he was entitled to take, and did take, the objection previously raised by him on the 21st December. That objection might properly, in our opinion, have been considered with reference to the question of costs. It could not operate as a valid answer to the summons or deprive the judge of jurisdiction to hear and determine the summons on the ground stated.

Another irregularity is now relied on by the plaintiff, namely, that the order appealed from, though it recites the affidavit of the solicitor for the defendants, does not recite the affidavits filed by the plaintiff in answer to the summons. That is an irregularity also which may properly be considered by us in dealing with the question of costs of the proceedings on the summons. But none of these objections go to the jurisdiction of the judge who made the order, and we come, therefore, to the main question raised by this appeal, namely, whether this order is a proper one.

The summons states several grounds. First, that the statement of claim discloses no reasonable cause of action; second, that the action, as disclosed by the pleading, is vexatious and frivolous. Both these grounds are authorised as grounds of a summons in proceedings in lieu of general demurrer, allowed by Order XXV., r. 4. The third is that the statement of claim is an abuse of the process of the Court. That is a ground founded on the general jurisdiction of the Court recognised by the *Judicature Act* and the *Supreme Court Act* 1890 as a ground upon which a pleading may be struck out and an action

be stayed or dismissed. There are three other grounds, y, that a corporation is incapable of committing the criminal charged in the statement of claim; that no action lies for ged criminal offence alleged to be committed in the giving of ce at the hearing or trial of a cause; and that the issue by this action in the statement of claim has already been cated upon. These may be treated as instances or illustra- of the third ground of this summons, namely, that the ent of claim is an abuse of the process of the Court, which substantive ground of this summons. The statement of alleges that the defendants in this action were defendants in ion known as *Merry* v. *The Queen and Others*, No. 899, of originally an equity suit, but stated erroneously to have been quently transferred by order of the Chief Justice, dated the y of February 1887, from the Equity Court to the common de of the Supreme Court. It alleges that the plaintiff, who red in person in the said action, is the plaintiff in this action. her alleges that the defendants answered the plaintiff's bill ity, and in doing so set out *in extenso*, omitting signatures ttestations, a certain alleged "attested copy of a deed of March 1860," purporting to have been signed by the plaintiff, hat the defendants attached thereto the common seal of the of Land and Works, whereby he (the plaintiff) was deprived effect of a decree of Her Majesty's Privy Council dated the ay of February 1866, and his share and interest in the ng and Ballarat railway contract entered into with the said of Land and Works, also under seal. In the statement mages the plaintiff defines his claim in these terms:— plaintiff claims 500,000*l.* for damages from the defendants aving uttered a forged 'attested copy of the alleged deed 8th March 1860,' purporting to have been signed by me, ng the same to be a forgery in an action for damages." In iginal action the plaintiff found it necessary to establish his to sue alone upon articles of agreement entered into in 1858 im and two partners with the Board of Land and Works. necessity arose from the fact that in March 1860 an arrange- was made by which the liabilities and rights arising under articles of agreement were transferred from the contractors to

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a person named Williams, and the defendants in this suit set up this deed of substitution, as it was called, dated 28th March 1860, as an answer to the action brought by the petitioner in his own name for damages springing from the alleged breaches of the original articles of agreement. It was, therefore, one of the principal questions to be determined in that suit whether the plaintiff was, or was not, a party to that deed of substitution of the 28th March 1860. The Court came to the conclusion of fact that he was a party to that deed, and had signed it. The grounds of that conclusion are set forth in the reasons given in the judgment, and which are made a part of the materials before the learned judge who heard this summons, and it appears from these reasons that amongst the other documentary evidence bearing on this question a document which purported to be an attested copy of this deed of the 28th March 1860, bearing date the 5th June of the same year, was put in evidence, being produced from the office of the Audit Commissioners, where it had been deposited for sixteen or seventeen years. This document bore the signature of the plaintiff, and he now alleges that he has discovered since the hearing that this copy signature appearing at that time upon this alleged attested copy of the original deed had been annexed to that copy by the authority of the defendants, and he charges the putting in evidence of that alleged attested copy as being an uttering of a forged attested copy of the deed by the defendants, knowing the same to be a forgery. The real purpose of the plaintiff, as he himself states in one of the affidavits he has filed, is to show that he is in a position to prove that his name was not on the original deed of which this copy purported to be a certified copy, and his avowed object in this suit is to raise the question again which has been decided already against him, viz., that he was not a party to the original deed of substitution. We think that that object is one which he cannot be permitted to attempt to establish in this action against the Board of Land and Works. The matter is *res judicata*. It has already been determined by the Court, and the judgment has been affirmed on appeal, that he was a party to that original deed of substitution, and he cannot be allowed to trifle with the established practice of this Court in the administration of justice by attempting to raise that question again by relying upon one of the documents put in

ace by the parties in the former suit in connection with the which the plaintiff then unsuccessfully sought to establish. d it is not easy to understand what the plaintiff means by ng the word "utter" or the term "forgery" to the production dence of a document of this kind. That a party to a suit l be liable to an action for putting in evidence a document of ind, and that this should be charged in a civil proceeding as ering of a forged document, is a novel doctrine, and an abuse meaning of a term of criminal law. A party is not liable ivil action for perjury committed by him as a witness, and it be strange if a party using a document should be liable in a ction for the crime of uttering that document put in evidence n on the hearing of a suit in which a question of this kind aised between the parties to the suit. We think that this is altogether an abuse of the process of the Court, and it is ty of the Court to approve the course taken by the learned at the hearing of this summons in striking out the statement m and dismissing the action and entering up judgment for efendants. In view of the irregularities which had taken n connection with this summons, we think that the order of rned judge should be varied by striking out so much of the as orders the plaintiff to pay to the defendant three guineas and we direct in lieu thereof that the defendants pay to the ff the costs (when taxed) of the summons. The order, as will stand. We give no costs of this appeal.

licitor for the plaintiff appellant: Plaintiff in person.
licitor for the defendant respondents: *Guinness*.

W. H. M.

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June 7, 30.

IN RE BELL, EXPARTE THE MARINE BOARD OF VICTORIA.

Marine Act 1890 (*No.* 1165), *s.* 183—*Charge of misconduct—Evidence Act* 1890 (*No.* 1088), *s.* 53—*Competent witness—Certiorari—Want of jurisdiction—Refusal to hear evidence.*

A charge of misconduct under sec. 183 of Act No. 1165 is not a charge of an indictable offence, nor of an offence punishable on summary conviction, and the person so charged is a competent witness on his own behalf.

Where the writ of *certiorari* has not been taken away by Statute, it may be granted either because there has been a total want of jurisdiction, or because there has been an irregularity in the exercise of jurisdiction.

The Court of Marine Inquiry, in the prosecution of a captain on the charge of misconduct, under sec. 183 of Act No. 1165, refused to allow the captain to give evidence on oath on his own behalf, but permitted him to make a statement.

Held (reversing Hood, J.), that the refusal to allow the captain to give evidence on oath was a ground for granting a writ of *certiorari*.

APPEAL from judgment.

This was an appeal from the judgment of Hood, J. (reported *ante*, p. 55), discharging a rule *nisi* for a writ of *certiorari* to bring up the proceedings of the Marine Court in connection with the suspension of the certificate of Captain F. Bell by the court. The facts are fully set out in judgment of the Court.

Mitchell for the appellant—The defendant Bell was a competent witness to give evidence on his own behalf. He was not charged with an indictable offence within the meaning of sec. 53 of the *Evidence Act* 1890. He was charged with misconduct, and if the charge is proved the court can find him guilty of certain offences specified in the sub-sections of sec. 183 of the *Marine Act* 1890, but he is not charged with those offences. In *Cattell* v. *Ireson* (*a*), Lord Campbell, C.J., held that a person charged with a breach of the game laws was a competent witness on his own behalf. In bastardy cases a defendant is a competent witness. *Certiorari* will lie where there has been a defect in the jurisdiction. *Certiorari* may go, when the Statute has not taken away such right, if there has been a want of jurisdiction. The proper reception of evidence is a condition precedent to the jurisdiction of the inferior court: *In re John Sullivan* (*b*). Although the court had power to enter

(*a*) E. B. & E. 91.

(*b*) 22 L.R. (Ir.) Q.B. 98.

upon the inquiry, yet if such court exceeds its jurisdiction in the course of such inquiry, the Court of Appeal will review the decision on *certiorari*. In the case of *Reg.* v. *Bolton* (*c*) the Court refused to go into the merits of the case on the ground that the case was within the jurisdiction of the Court, and the proceedings on the face of them were regular and according to law; but at the time of that decision all the evidence taken on such summary proceedings had to be set out, and the Court would not allow other evidence to be added to show want of jurisdiction; later legislation, however, dispenses with the obligation of setting out all the evidence. The Marine Court had no jurisdiction to make a finding on the charge without allowing Bell to be heard according to law. In the case of *The Colonial Bank* v. *Willan* (*d*) there is no actual distinction drawn between cases where the Statute has taken away *certiorari* and the cases where it is not taken away. If the Marine Court acted in excess of its jurisdiction, the writ should be allowed: *Penny* v. *South-Eastern Railway Co.* (*e*). It is not a matter of discretion, but the Court should grant the writ *ex debito justitiæ*: *Reg.* v. *Justices of Surrey* (*f*).

Counsel referred to the following cases:—*Reg.* v. *Steward* (*g*); *Reg.* v. *Vipont* (*h*); *Reg.* v. *Chantrell* (*i*).

Box and *Woinarski* for the respondent—The objection taken does not affect the jurisdiction of the Marine Court to try the case, but simply points to an error or mistake which the court committed at the hearing. There is no case which goes to such a length as to decide that a mere blunder in a collateral matter such as this was can be reviewed by the Court upon *certiorari*. This refusal to hear Bell upon oath is not connected with the matter now impeached; it does not affect the jurisdiction to try the charge. The rejection of evidence was a matter within their jurisdiction to decide. If the contention of the appellant were correct, the appeal sections would be unnecessary. The evidence of Bell could not possibly have shown want of jurisdiction to hear the actual charge. The

(*c*) 1 Q.B.D. 66.
(*d*) L.R. 5 P.C. 417.
(*e*) 7 E. & B. 660.
(*f*) L.R. 5 Q.B. 466.
(*g*) 9 Q.B.D., p. 743.
(*h*) 2 Burr. 1162.
(*i*) L.R. 10 Q.B. 589.

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result of his evidence might have affected the decision of the Court, but it could not affect its jurisdiction. Where *certiorari* is not taken away by Statute, a party may apply for a writ for any mistake in the lower court which affects that court's jurisdiction; but where it is taken away the only grounds upon which the writ can be obtained are, manifest fraud or inherent want of jurisdiction. Misdirection is no ground for *certiorari*: *Reg.* v. *Ingham* (*k*).

Counsel referred to *The Colonial Bank* v. *Willan* (*l*); *Short and Mellor on the Practice of the Crown Office*, pp. 116, 119.

Counsel were not called upon as to the point whether the appellant was a competent witness.

Mitchell in reply—The whole object of the writ of *certiorari* is to enable the superior courts to superintend the inferior courts. In *The Colonial Bank* v. *Willan*, the Court decided that even where the writ is taken away by Statute, it may go in a variety of cases.

Counsel referred to *Reg.* v. *Commissioners of Cheltenham* (*m*).

Cur. adv. vult.

Upon a subsequent date the Court intimated that arguments would be heard on behalf of the respondent on the question whether the appellant was a competent witness.

Woinarski for the respondent—The charge was of a criminal nature; it affected the status of the appellant. The fact of the charge not being called a crime does not affect it. The Marine Court prosecutes on behalf of the public, and it is a matter affecting public rights.

HIGINBOTHAM, C.J. This is an appeal from an order of Hood, J., discharging, with costs, an order calling upon the Court of Marine Inquiry, and the members thereof, to show cause why a writ of *certiorari* should not issue to remove their determination into the Supreme Court with the view of quashing the same. There are four grounds set out in the order *nisi* for the *certiorari*.

(*k*) 5 B. & S. 257. (*l*) L.R. 5 P.C., p. 442. (*m*) 1 Q.B. 467.

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One of these was abandoned on the argument, and the rest were overruled by the learned primary judge. The argument before this Court is raised on the fourth ground only, namely, that the said Marine Court refused to allow the said Frank Bell to be sworn as a witness on his own behalf.

The Court of Marine Inquiry is a Court of Record constituted under the *Marine Act* 1890, secs. 180-183. It is held whenever it may be required by the responsible Minister of the Crown administering the Act, or whenever the president of the Marine Board thinks fit; and it is authorised to hold formal investigations into charges of incompetency or misconduct on the part of certificated masters and others (sec. 183), upon, or without, a preliminary inquiry by the Marine Board into the same charges (sec. 176), and whenever such investigation is directed by the Board, the Court may determine that the certificate shall be cancelled or suspended, sec. 183 (2). By sec. 177 it is provided that—

"Every such investigation shall be conducted in such manner that if a charge is made against any person that person shall have an opportunity of making a defence, and of showing cause why his certificate or license should not be cancelled or suspended."

In the present case Mr. Bell, late master of the s.s. *Gambier*, was duly notified on 14th October 1891 that a charge of misconduct, as the master of the *Gambier*, had been made against him by the Marine Board, that the Board had ordered a formal investigation, and that the Court of Marine Inquiry would proceed, on a day mentioned, to hold a formal investigation into the charge, at which time he was commanded to attend, and he was informed that he should be heard in his defence. When the case came on to be heard, the evidence of Mr. Bell was tendered on his own behalf as evidence which should be taken. The Court refused to allow him to be sworn, but "a statement was then made by the said Frank Bell, and such statement was taken down and subscribed by him." The Court, by its judgment, found the charge of misconduct proved against Mr. Bell, and that such misconduct amounted to gross misconduct, and it therefore suspended his certificate as a master for a period of nine months from the date of the determination, 27th October 1891. In an annexe to the judgment, dated the

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same day, and signed and sealed by the members of the Court, Mr. Bell's name is omitted from the list of witnesses whose evidence is taken before the Court, and it is stated that "no witnesses were called in refutation of the charge."

We are of opinion that the court in refusing to allow Mr. Bell to be sworn committed an error, and thereby deprived him of a legal right. Probably the court supposed that this formal investigation, in which it was engaged, was a criminal proceeding in which Mr. Bell was incompetent to give evidence for or against himself. But such disqualification is confined to cases where in a criminal proceeding a person is charged with the commission of some indictable offence, or an offence punishable on a summary conviction: See *Evidence Act* 1890, sec. 53. But a charge of misconduct under the *Marine Act* 1890 is not a charge of an indictable offence, nor of an offence punishable on summary conviction. The proceedings in this case resembled rather proceedings on the hearing of a complaint for desertion of a wife by her husband, where the husband's evidence must be received if he tender it: *Reg* v. *Pope* (*n*), where an order for maintenance was quashed on the ground that the justices improperly refused to allow the husband to be sworn and to give evidence. The learned judge held that the act of the Court of Marine Inquiry amounted to nothing more than a mistake in a matter in which the court had jurisdiction, that it did not deprive the court of jurisdiction to determine the charge of misconduct, and that, as the proceedings on the face of them were regular and according to law, the writ of *certiorari* would not lie to quash the determination. If there was no want or failure of jurisdiction in the court created by its mistaken act of refusal, this conclusion would, I think, be correct, according to the authorities, in a case like the present, where a writ of *certiorari* is sought for the removal of a determination or order of an inferior court: *Reg.* v. *Bolton* (*o*); *Reg.* v. *Cambridgeshire* (*p*). These cases show that where there has been no want of jurisdiction in the inferior court, and the proceedings are *on the face of them* regular and according to law, the writ of *certiorari* will not issue to ascertain if the inferior court has come to a correct decision on the merits, if there is any evidence to support

(*n*) 5 V.L.R. (L.) 25. (*o*) 1 Q.B. 66. (*p*) 4 A. & E. 111.

ecision. But it has been argued for the appellant that ell had a legal right, both at common law and by the express of this Statute and of the *Evidence Act* 1890, sec. 49, to estimony on his own behalf, under the sanction and with the rity of his oath, that the allowance of that right is a condition jurisdiction of the court created by the Statute, and that the owance of the right goes to jurisdiction, and not merely to the of the question to be investigated. I am of opinion that rgument is correct, and must prevail.

he conditions on which the right of every tribunal of limited iction depends may be founded either on the character and tution of the tribunal, or upon the subject-matter of the y, or upon certain proceedings which have been made ial preliminaries to the inquiry, or upon facts or a fact to be cated upon in the course of the inquiry, or upon the establ- ent of some fact after the inquiry has been legitimately enced, which ousts the jurisdiction and places the subject- r of the inquiry beyond it: See *Colonial Bank of Australasia* v. *n* (*q*); or upon the omission, at any stage of the proceedings the decision, of an essential element of jurisdiction: *Exparte augh* (*r*); *Reg.* v. *Smith* (*s*); *Reg.* v. *Farmer* (*t*). In the f these three last-mentioned cases, *Exparte Bradlaugh* (*r*), a trates' order for the destruction of obscene books, under the rity of an Act of Parliament, was held bad for want of juris- n where it merely stated that the magistrate was satisfied that ooks were obscene, but omitted a second essential condition isdiction also created by the Act, namely, that the books the proper subject of a prosecution for misdemeanour. *eg.* v. *Smith* (*s*) jurisdiction to hear an information was to justices on appearance of the parties summoned, or upon that the summons was duly served upon such party a nable time before the time appointed for his appearance. s held that the justices had no jurisdiction to convict because had no evidence before them that reasonable time had elapsed en the time of the service of the summons and the day for ng the summons, and the writ of *certiorari* was ordered to

L.R. 5 P.C., p. 443-4.
3 Q.B.D. 509.
(*s*) L.R. 10 Q.B. 604.
(*t*) 1892, 1 Q.B. 633.

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issue. *Reg.* v. *Farmer* was a case for an affiliation order. The jurisdiction of the justices only attached on proof that the summons had been duly served, and it was held that the court had power to inquire into the validity of the service, and upon proof that the service was invalid that a *certiorari* would be granted on the ground of want of jurisdiction of the justices. In the present case I think the Act of Parliament makes it an essential element of the jurisdiction of the Court of Marine Inquiry to hold a formal investigation into a charge of misconduct, that the proceedings shall be conducted in such a manner that the person charged shall have an opportunity of making a defence, that is to say, a defence in a lawful and authoritative form, by the evidence on oath of the person charged or of other witnesses. The court has stated that no witnesses were called in refutation of the charge, while the affidavits show that Mr. Bell tendered himself as a witness, and his evidence was rejected as that of a person incompetent to give evidence. This act of rejection of evidence was a matter extrinsic to the merits of the question to be investigated; there was, in fact, no evidence on which any conclusion could properly be arrived at, and the court had no jurisdiction, in my opinion, to make a determination conducted in such a manner as to be wanting in this essential condition of the statutory jurisdiction. The appellant was the party aggrieved by the act of the inferior court, and he is therefore entitled *ex debito justitiæ* to ask the Court in the exercise of its discretion to issue the writ to quash the proceedings: *Reg.* v. *Justices of Surrey* (*v*).

HOLROYD, J. I have had the advantage of reading the judgment of my brother Hodges, and I concur entirely with his judgment.

HODGES, J. I agree with the conclusion arrived at by the Chief Justice, but desire to express my reasons. This is an appeal from an order of Hood, J., refusing to grant a writ of *certiorari*. It appears that the Court of Marine Inquiry, under sec. 183 of the *Marine Act* 1890, investigated a charge of misconduct against Frank Bell, the applicant for the writ of *certiorari*. That court found

(*v*) L.R. 5 Q.B. 466.

Frank Bell guilty of gross misconduct, and suspended his certificate for nine months. In that investigation Frank Bell tendered himself as a witness on his own behalf, and desired to be sworn and examined. The Court of Marine Inquiry refused to allow him to be sworn or to give *evidence* in his own behalf, but permitted him to make a statement. His own evidence was the only evidence he had to offer, so that refusing to take his own evidence was a refusal of all the evidence he had to offer. He contends that that court was wrong in declining to allow him to be sworn and to give evidence, and that this wrong decision entitles him to a *certiorari* to bring the proceedings of the Court of Marine Inquiry into this Court with a view to having them quashed.

The learned judge whose decision is appealed from was of opinion that the Court of Marine Inquiry was wrong in not allowing Frank Bell to be sworn and to give evidence in his own behalf, and I think he was right in that opinion. Frank Bell was a competent witness unless disqualified by sec. 53 of the *Evidence Act* 1890. That section applies only to a person "who, in a criminal proceeding, is charged with the commission of an indictable offence, or an offence punishable on summary conviction." Now Frank Bell was only *charged* with misconduct in carelessly navigating the Gambier. This charge is neither an "indictable offence" nor "an offence punishable on summary conviction." The Marine Court found him guilty of *gross* misconduct, which it was entitled to do, although Frank Bell had not been *charged* with *gross* misconduct. And having found him guilty of *gross* misconduct it suspended his certificate. But if it had found him guilty only of misconduct his certificate would not have been suspended, nor would any consequences of a penal nature have followed. I am, therefore, of opinion that sec. 53 does not render Frank Bell incompetent as a witness, and that he was entitled to to be sworn.

The question remains, does that wrong decision entitle Frank Bell to require the Supreme Court to issue a writ of *certiorari*? It is now well settled law that whether *certiorari* has or has not been taken away by Statute, this writ will not be granted to try in the superior court a matter which the inferior court is authorised to determine. The writ will not be issued to

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enable parties to have the action tried in the superior court on its merits: *Reg.* v. *Bolton* (*w*). But where the writ has not been taken away by Statute it may be granted, either because there has been a total want of jurisdiction in the inferior court, or because there has been an irregularity in the exercise of jurisdiction. This, I think, is shown by the judgment of Patteson, J., in the case of *Reg.* v. *Sheffield Railway Co.* (*x*). In that case Patteson, J., says:—"A distinction has been made between a total want of jurisdiction, in which case the clause for taking away the writ of *certiorari* has been held inapplicable, and a mere irregularity in the exercise of jurisdiction, in which case it does apply." That is, a writ of *certiorari* will be granted where there has been an "irregularity in the exercise of jurisdiction," unless the writ has been taken away by Statute. This view is, I think, borne out by *Reg.* v. *Bolton*, which case, in my opinion, also shows that the matter complained of here is an irregularity in the exercise of jurisdiction, and that this irregularity can be shown by affidavit. In the report of the case last mentioned (which is a leading case on the subject, and the judgment a considered one) the side note states that "when a conviction or order of justices is returned to this Court and *the proceedings are regular in form and in practice*, and the case one over which the justices had jurisdiction, the Court will not hear affidavits impeaching their decision on the facts." From which I should infer that affidavits might be used to show that the proceedings were not regular in form and practice, and the considered judgment of the Court, after stating what was in the return, contains the following passage:—"No affidavit denies that such evidence was offered, *that the defendant was heard in his defence*, or that such judgment was pronounced. Beyond this we cannot go." This seems to show that an affidavit alleging that the defendant was not heard in his defence would have been admissible, and though the case does not say that this would, yet it might have altered the decision. Then in *The King* v. *Crowther* (*y*) a conviction was brought up by *certiorari* and quashed because the witness had not been sworn and examined in the presence of the defendant. This, as I take it, would be what Patteson, J., calls an irregular exercise of jurisdiction.

(*w*) 1 Q.B. 66. (*x*) 11 A. & E. 194. (*y*) 1 T.R. 125.

Has there been, in the case now under appeal, such an irregular exercise of jurisdiction as justifies the issue of the writ? By sec. 177 of the *Marine Act* 1890, which deals with investigations such as that which was being conducted against Frank Bell, it is provided that such person "*shall* have *an opportunity of making a defence* and of showing cause why his certificate or license should not be suspended." A man's defence is made up of two parts: primarily of his evidence, and secondly of argument; but, ordinarily, the most important part of a man's defence consists of his evidence, the argument being merely supplementary. In this case the Court of Marine Inquiry refused to take the evidence of Frank Bell, which happened to be all his evidence, and so Frank Bell had not that which the Statute says he *shall* have—an opportunity of making a defence. This refusal of the court to take the applicant's evidence was, in my opinion, a grave irregularity in the exercise of its jurisdiction, and that this irregularity can be shown by affidavit is indicated by *Reg.* v. *Bolton*. Further in the case of *Rex* v. ——— (*z*), the defendant had been prosecuted for selling other than a "Winchester" bushel. He produced the vendee as a witness; the magistrates rejected him as incompetent. For that error of the magistrates *certiorari* was granted, and I think it should be granted in this case for the rejection of Frank Bell as incompetent.

ORDER made, without costs, that a writ of *certiorari* issue to remove the determination of the Court of Marine Inquiry into this Court with the view of quashing the same.

Appeal allowed, without costs.

Solicitors for appellant: *Gillott, Croker & Snowden.*
Solicitor for respondent: *Guinness*, Crown Solicitor.

W. H. M.

(*z*) 2 Chitty 137.

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June 1, 6, 21, 27.
July 18.

A'Beckett, J.

IN RE THE CHATSWORTH ESTATE COMPANY LIMITED.
IN RE CLARKE, EXPARTE HARTNELL.

Companies Act 1890 (*No.* 1074) *s.* 36—*Rectification of register—Transfer of shares—Execution of transfer by transferror and transferree—Discretion of directors to assent to transfer—Acts of secretary not binding on company—Jurisdiction of Court to assent to transfer after liquidation.*

H. sold shares through B., the secretary of a company, to C., in March 1890. B. acted as H.'s broker in this transaction. H. executed the transfer and lodged the same with B., requesting him to secure the execution of the transfer by C. The articles of association of the company provided that transfers must be signed by both transferror and transferree, and that the directors might decline to register any transfer without assigning any reason therefor. C. was a director of the company during the year 1890, and up to the time of the company going into liquidation. After March 1890 no notices were ever sent to H., but notices of calls in respect of these shares were sent to C., and C. paid all the calls. During the year 1891 H. discovered that his name was still on the register and that C.'s name was written in pencil on the register. H. took no steps in the matter until, in the middle of the year 1891, a notice of call was sent to him and he thereupon called on B., the secretary, and asked for an explanation, and B. said that it was a mistake, and that the notices were being and would continue to be sent to C., who had purchased the shares. No other notices were sent to H. until the beginning of 1892, when, upon receiving a notice of a call, H. wrote to the directors of the company stating that he had sold the shares and asking to have his name removed from the register. The directors refused to remove his name from the register.

The company soon afterwards went into liquidation and H.'s name was placed upon the list of contributories.

Upon an application by H. to have his name removed from the list of contributories,

Held, that it was the duty of H., as transferror, to see that his name was removed from the register, and that the company were not bound by the act of the secretary in sending notices to C., and that the company had not accepted C. as a member in respect of these shares, and there being no negligence or default on the part of the company, H. was rightly placed upon the list of contributories.

Upon a further application by H. to have the register rectified by removing his name from the register and substituting the name of C. as shareholder,

Held, that the directors having the power to decline to accept a transfer, the Court had no jurisdiction after the company had gone into liquidation to exercise the discretion which rested with the directors.

THIS was a motion made on behalf of William Albert Hartnell for an order to remove his name from the list of contributories of the Chatsworth Estate Co. Limited, in liquidation. The affidavits in support of the motion alleged that Hartnell, who had been shareholder of three hundred shares in the company, had sold these shares in March 1890 to H. St. John Clarke, through R. Balding, who was the secretary of the company. After the sale of the shares Hartnell signed the transfers and handed them to

Balding to obtain the execution of the same by the transferree. The transferree never executed the transfer. The articles of association required that a transfer should be signed by both transferror and transferree. After March 1890, no notices were sent to Hartnell until May 1891, when a notice of call was sent to him; he thereupon saw Balding, who stated that the notice had been sent by mistake, and that Clarke was the purchaser of his shares, and that the notices were being sent to him. Hartnell, about this time, saw the register of the company in which his name still appeared as shareholder, but across the register written in pencil was the name of Clarke. In January 1892, Hartnell saw Clarke and asked him to execute the transfer, and Clarke said that he was paying the calls but would not consent definitely to execute the transfer. In February 1892, in consequence of another notice received by Hartnell, he wrote to the company requesting to have his name removed from the register and the company wrote refusing. The company, shortly afterwards, went into voluntary liquidation. All the calls had been paid by Clarke in respect of these shares. Clarke was a director of the company and the holder of other shares.

Moule in support of the motion—It is not necessary that the transfer should be signed by the transferree if the company has waived such signature, or has in any way accepted the transferree as shareholder in place of the transferror: *In re Switchback Co.* (*a*); *Nicol's Case* (*b*); *Straffon's Case* (*c*); *Taurine Co. Case* (*d*); *In re Floating Dock Co.* (*e*). The company in this case sending notices to Clarke and accepting his money in respect of the calls has acknowledged him as a shareholder. The execution of transfers is required merely as matter of proof that a person is a shareholder or member, but a member is defined as being a person who has agreed to become a shareholder in the company, and this agreement need not necessarily be proved by the signatures of the persons, but may be proved *aliunde*. The company is estopped from

(*a*) 16 V.L.R. 339.
(*b*) 3 DeG. & J., p. 445.
(*c*) 1 DeG. M. & G. 576; 4 De G. & Sm. 256.
(*d*) 25 Ch. D. 118.
(*e*) W. N. 1877, p. 27.

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claiming a right to retain Hartnell on the register, inasmuch as no notices have ever been sent him, and he has had no opportunity of interfering in the affairs of the company. His position has been changed by the conduct of the company. The act of the secretary is the act of the company, and the company is bound by his conduct: *Parson's Case* (*f*). There is nothing to prevent the company from placing Clark on the register, and on the list of contributories, as by his conduct he undoubtedly is estopped from asserting that he never agreed to become a member in respect of these shares.

Counsel also referred to the following cases: *Bush's Case* (*g*); *Curtis' Case* (*h*); *Palmer on Companies* (6th ed.), p. 271.

Mackinnon for the liquidator to oppose—Although a shareholder has sold his shares he is not relieved from being a contributory if, owing either to his own neglect or that of his transferree, or if, in fact, owing to any cause except the neglect of the company, his transferree's name has not been substituted for his at the time of the winding up: *Marshall* v. *Glamorgan Iron and Coal Co.* (*i*). It was the duty of the transferror to see that the purchaser's name was placed on the register. The company has been guilty of no negligence. The act of the secretary cannot bind the company in a case like this so as practically to alter the register of members without the knowledge or sanction of the company: *Essendon Land Tramway Investment Co.* v. *Upton* (*k*). The transfer must be executed by both parties before it has any effect according to the articles of association, and if this be not done the company has no power to accept such transfer: *Marino's Case* (*l*); *Musgrave & Hart's Case* (*m*); *Head's Case* (*n*); *Walker's Case* (*o*). Representations made by a manager of a company as to the company's financial position cannot bind the company: *Barnett* v. *South London Tramway Co.* (*p*).

Moule in reply.

Cur. adv. vult.

(*f*) L.R. 8 Eq. 656.
(*g*) L.R. 6 Ch. 246.
(*h*) L.R. 6 Eq. 30.
(*i*) L.R. 7 Eq. 129.
(*k*) 17 V.L.R. 248.
(*l*) L.R. 2 Ch. 596.
(*m*) L.R. 5 Eq. 193.
(*n*) L.R. 3 Eq. 84.
(*o*) L.R. 2 Eq. 554.
(*p*) 18 Q.B.D. 815.

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A'BECKETT, J. Mr. William Albert Hartnell was the owner of 300 shares in the Chatsworth Estate Company Limited in March 1890. He then employed Mr. R. L. Balding, the secretary of the company, as his broker, to sell the shares. Mr. Balding told him the shares were sold, paid him the price, less commission, and Mr. Hartnell left with him the scrip certificates with transfers endorsed signed in blank. The transfers were never signed by the purchaser or registered. The company went into voluntary liquidation in April of this year with Mr. Hartnell's name remaining on the register as the holder of these shares. Mr. Hartnell now applies to have his name removed from the list of contributories. He grounds his application on the facts that after the sale of the shares, for about two years with only one exception, no notice of calls or of meetings in the company were sent to him; that calls were paid by the purchaser, and that in the register book the words, "sold to Dr. St. John Clarke," have been written in pencil on the page in which Mr. Hartnell's name is entered as owner of the shares. The motion is not made on notice to the purchaser of the shares to have his name substituted, but merely against the liquidator, to have Mr. Hartnell's name taken off. Counsel for the applicant relied upon cases showing that a company may become estopped from denying that a person is a shareholder or has ceased to be a shareholder, though the provisions of the company's articles have not been strictly complied with as to his becoming or ceasing to be a shareholder. The facts of the present case appear to me to create no estoppel against the company. The company is not responsible for the misconduct of Mr. Balding as Mr. Hartnell's broker. The inference from the facts disclosed by the applicant's own affidavit is that, for purposes of their own, Mr. Balding, and Dr. Horatio St. John Clarke, the purchaser, arranged that Dr. Clarke should not become transferree of Mr. Hartnell's shares, but that Mr. Hartnell should be led to suppose that he had become such by Dr. Clarke paying the calls and Mr. Balding sending no notices to Mr. Hartnell. Dr. Clarke has had no opportunity for explanation, and I therefore make no comment on his conduct in the transaction. It is enough for me to say that I find no deception practised by the company, and no evidence of any breach of duty or representation by the company which precludes the

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liquidator from saying that Mr. Hartnell has not ceased to be a member in respect of these 300 shares. Mr. Hartnell, according to his affidavit, made no inquiry for the purpose of ascertaining whether the shares had been transferred. He trusted entirely to Mr. Balding, but the facts set out in paragraphs 6 and 7 of his affidavit show that early in 1891 he discovered how matters stood, and yet did nothing to enforce a proper transfer of liability. He has now no right to have his name removed without substituting that of the purchaser. I dismiss the present application with costs, to be paid to the liquidator, but without prejudice to any application to rectify the register by substituting the name of the purchaser for that of the applicant as to all or any of the shares referred to and with liberty to use the affidavit made in this application on any renewed application as to such shares.

A motion was subsequently made in this matter, calling upon Clarke and the liquidator to show cause why the register of the company and the list of contributories should not be rectified by substituting the name of Clarke for that of Hartnell. The same affidavits were used as upon the former motion, and evidence was taken *viva voce*. Clarke admitted that he was liable to indemnify Hartwell in respect of these shares, but contended that his name could not be placed upon the list of contributories, and that the register could not now be rectified. Clarke denied that he had ever agreed to execute the transfer, and stated that all the notices of the calls in respect of these shares were endorsed by Balding with Hartnell's name on them. No evidence was offered on behalf of the directors as to Clarke's financial position or as to any knowledge by them of the matters in dispute, though Balding stated that the fact of the transfer had never been brought by him before the directors.

Moule in support of the motion—As Clarke has admitted his liability to indemnify Hartnell, the Court will exercise its discretion, as it has jurisdiction so to do, to order specific performance of the contract without putting the parties to the expense of a suit for that purpose: *Exparte Shaw* (*q*); *Lowe's Case* (*r*). A decree for

(*q*) 2 Q.B.D. 463. (*r*) L.R. 9 Eq. 589.

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specific performance can be made in contracts for the purchase of shares, and the purchaser may be ordered to execute the transfers and procure his registration: *Paine* v. *Hutchinson* (*s*); *Wynne* v. *Price* (*t*); *Ward's Case* (*v*). In *Walker's Case* (*w*) the Court refused to exercise the directors' discretion as to accepting the transferree as a shareholder, but this case is inconsistent with the case of *Exparte Shaw*. In the absence of any evidence to the contrary, it must be assumed that there is no objection to Clarke as being a responsible person: *Buckley on Companies* (5th ed.), p. 84. The liquidator stands in the same position as the directors, and the fact of the company being in the course of winding up does not affect this application.

Counsel referred to the cases cited in the previous motion, and also to the following:—*Shortbridge* v. *Bosanquet* (*x*); *Fyfe's Case* (*y*).

Higgins for Clarke to oppose—There is no power after liquidation to rectify the register and remove the name of a person from the list of contributories. The company has not been in default, and the Court will not relieve the applicant, as it is owing to his own negligence that his name was left on the register: *Marshall* v. *Glamorgan Iron and Coal Co.* (*z*). All the cases cited for the applicant are cases where the application was made before the winding up. The Court cannot assume the position of the liquidator or directors and exercise their discretion for them.

Counsel referred to the following cases:—*Musgrave & Hart's Case* (*a*); *Marino's Case* (*b*); *Walker's Case* (*c*).

Mackinnon for the liquidator to oppose—The liquidator objects to the substitution of Clarke's name for that of Hartnell, and the Court will not interfere at this stage and compel him to accept Clarke as transferree.

Counsel referred to the cases cited on the previous argument.

Cur. adv. vult.

(*s*) L.R. 3 Eq. 257.
(*t*) 3 De G. & Sm. 310.
(*v*) L.R. 2 Eq. 226.
(*w*) L.R. Eq. 254.
(*x*) 16 Beav. 84.
(*y*) L.R. 4 Ch. 768.
(*z*) L.R. 7 Eq. 129.
(*a*) L.R. 5 Eq. 193.
(*b*) L.R. 2 Ch. 596.
(*c*) L.R. 2 Eq. 554.

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In re THE CHATSWORTH ESTATE CO. LIMITED.

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A'BECKETT, J. This is an application under sec. 36 of the *Companies Act* 1890 to rectify the register of a company in liquidation by substituting the name of Dr. Horatio St. John Clarke for that of Mr. William Albert Hartnell, as holder of 300 shares. Mr. Hartnell sold these shares in March 1890, and Dr. Clarke bought them, and paid calls on them. He has, by his counsel, admitted that he is liable to indemnify Mr. Hartnell against all payments which he may have to make in respect of them, but he contends that as the company is in liquidation he cannot be placed on the register as the holder of them, and that he ought not in any case to pay the costs of the application which the notice of motion seeks against him. This matter has been already before me in another shape on an application by Mr. Hartnell, as against the liquidator only, to have his name taken off the register on the ground that by default of the company his name was left on. I dismissed that application, holding that there had been no default by the company, and my views as to the company are confirmed by the additional facts appearing on this second application. Dr. Clarke's position is that he told Mr. Robert Lallam Balding, who acted as broker for Mr. Hartnell, that though willing to buy the shares he was unwilling to have his name put upon the register as the holder of them. The subsequent litigation has been caused by Mr. Balding concealing this fact from his principal. Mr. Balding says that he told Dr. Clarke that Mr. Hartnell was anxious to have his name taken off the register, yet knowing of this anxiety and that his name was not taken off, and that the purchaser refused to have his name put on, he took payment of his commission from Mr. Hartnell without informing him of these facts. He left him from month to month, and year to year, under the impression that his name had been removed, obtaining payment of calls from Dr. Clarke, and as secretary of the company giving receipts for payments from W. A. Hartnell, "per Dr. St. John Clarke."

The position of the company and of Dr. Clarke cannot be affected by the misconduct of Mr. Hartnell's broker. No transfer of the shares was ever signed by Dr. Clarke. The company's articles of association provide that every transfer shall be signed both by transferror and transferree, and that the directors may

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decline to register any transfer without assigning any reason therefor. Counsel for Dr. Clarke and for the liquidator contended that under these circumstances there could be no rectification of the register in respect of the shares, as Mr. Hartnell rightly remained on the register when the company went into liquidation, and as the transfer which had not then been perfected cannot now be perfected and approved by the directors. Authority supports this contention. In *Musgrave & Hart's Case* (*d*) Vice-Chancellor Malins felt himself constrained by previous decisions to decide that where an intended transferree had not signed the transfer as required by the articles the register could not be rectified by substituting his name for that of the intended transferror. The law upon the subject is stated as follows, and supported by a reference to a number of authorities in *Buckley on Companies* (6th ed.), p. 133:—"If the conditions of the articles in respect of transfer have not been complied with by the transferror and transferree before the winding up, the Court cannot interfere to dispense with that which the articles require, or to exercise a discretion which rests with the directors." Where, as in this case, the purchaser is willing to take up the burden of the vendor, and there is no suggestion that he is not able to bear it, or that the directors would have objected to a transfer to him, I should have been glad if the law had allowed me to direct the substitution, but on my view of the law I am precluded from directing it, and I must therefore refuse the application, with costs to be paid by Mr. Hartnell to the liquidator and to Dr. Clarke. I should not have given costs against Dr. Clarke in any case, as I think he is not to blame in the matter, and the notice of motion asked for costs against him.

Solicitors for applicant: *Willan & Colles.*
Solicitors for Clarke: *Smart & Walker.*
Solicitors for liquidator: *Blake & Riggall.*

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(*d*) 5 Eq. 193.

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March 18, 25.
August 2.

THE QUEEN *v.* BELL AND OTHERS.

The Licensing Act 1890 (*No.* 1111), *s.* 25—*Meaning of the word "township"—Roadside victualler's license.*

In sec. 25 of the *Licensing Act* 1890 the word "township" must be interpreted according to its popular meaning, and not as meaning a portion of territory which has been proclaimed a township under the *Land Act*. A certain place consisted of two houses and a mechanics' institute.

Held, by the Full Court, affirming the decision of Holroyd, J., that the licensing magistrates were right in deciding that this place was not a township within the meaning of the word in sec. 25 of the *Licensing Act* 1890, and that therefore a roadside victualler's license might be granted for such place under the provisions of the above section.

APPEAL from judgment.

This was an appeal from a judgment of Holroyd, J., discharging a rule *nisi* for a writ of *certiorari* calling on the licensing magistrates for the licensing district of Woodside, the receiver and paymaster at Port Albert, and one Greenwell, to show cause why the certificate granted and issued by the licensing magistrates, authorising the issue of a roadside victualler's license to the said Greenwell, for certain premises situate at Currajung, the duplicate of such certificate, and the license issued thereon should not be quashed.

In December 1891 Greenwell had applied to the Licensing Court for the Woodside licensing district for a roadside victualler's license for certain premises at Currajung. Currajung had been proclaimed a township on the 14th May 1886 under the provisions of "*The Land Act* 1884." Currajung consisted of three buildings —two houses and a mechanics' institute. The application was opposed on the ground that inasmuch as Currajung was itself a township no such license could be granted under sec. 25 of the *Licensing Act* 1890, which provides that such licensed houses are not to be within ten miles of any village or township. The statutory number of licensed houses already existed in this licensing district. The magistrates, however, granted a certificate for the issue of a roadside victualler's license, and a license issued on that certificate. The Crown then obtained an order *nisi* for a writ of *certiorari* to bring up the certificate and license to be quashed on the grounds that the magistrates had no jurisdiction to grant or

issue the certificate, and that on proof at the hearing that Currajung had been proclaimed a township their jurisdiction was ousted. On motion to make the rule absolute, Holroyd, J., held that the word "township" in sec. 25 of the *Licensing Act* 1890 meant a collection of dwellings somewhat larger than a village, and that the magistrates had jurisdiction to grant a certificate for the issue of a roadside victualler's license, and he therefore discharged the order *nisi*. The following is the judgment of the learned primary judge:—

March 25.

HOLROYD, J. This was a rule *nisi* calling on the licensing magistrates for the licensing district of Woodside, the receiver and paymaster at Port Albert, and one William George Greenwell to show cause why the certificate granted and issued by the licensing magistrates on the 7th December last, to authorise the issue of a roadside victualler's license to the said William George Greenwell for certain premises situated at Currajung in the licensing district of Woodside, the duplicate of such certificate, and the license issued thereon should not be quashed on two grounds—First, that the magistrates had no jurisdiction to grant or issue the certificate; and, secondly, that on proof at the hearing that Currajung was a township, the jurisdiction of the licensing magistrates to issue a certificate for a license was ousted.

The question of the magistrates' jurisdiction depends entirely upon the meaning of the word "township" as used in the 25th section of the *Licensing Act* 1890. Another point appears to have been raised, but before me it was abandoned. By the 25th section it is enacted that the Licensing Court for any licensing district may grant roadside victuallers' licenses in excess of the statutory number of victuallers' licenses to any persons who are in the opinion of the Court fit and proper persons, and who keep houses within such licensing district containing sufficient accommodation for the probable requirements of the public travelling in that locality, but such houses must be situated in mountainous districts; not within ten miles of any village or township and at least ten miles distant from the nearest licensed victualler's house, which at the time of the issue of the license affords accommodation to the public travelling along some

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road to be measured along such road. It was argued in support of the license that a "township" in this section does not signify a township on paper, but a real town, that is to say, a collection of houses larger than, in common parlance, is understood by the word village, and that this interpretation is strengthened by its being placed in conjunction with "village." On the other hand, it was contended that "township" signified land proclaimed as a township under sec. 16 of the *Land Act* 1890, or under sec. 73 of the same Act. The first part of sec. 16 is as follows:—

"The Governor-in-Council may subdivide each county into parishes and townships, and by proclamation, to be published in the *Government Gazette*, may define the boundaries of such parishes or townships, and may distinguish each by a name; and after such proclamation the territory comprised within the boundaries of any of the said divisions shall thenceforward be recognised as a parish or township by the name so given as aforesaid."

By section 73—

"The Governor-in-Council may from time to time, by a notice in the *Government Gazette*, proclaim as a township any portion or portions of Crown lands, and the lands in such township . . . . shall be sold by auction, etc."

Currajung was proclaimed a township under the 73rd section of "*The Land Act* 1884," by proclamation published in the *Government Gazette* of the 14th May 1886. It was proved to the magistrates' satisfaction that there was no "actual township," by which expression the magistrates meant town at Currajung; that at the time of the application, and for some time previous, no accommodation was or had been afforded for the travelling public in that locality, and that a necessity for such accommodation existed. It was also proved to their satisfaction that all requirements as to notices had been complied with; that the applicant was a fit and proper person; that he kept a house within the said licensing district which, in the opinion of the Court, contained sufficient accommodation for the probable requirements of the public travelling in the locality; that such house was situated on the coach road from Rosedale to Yarram Yarram, in a mountainous district, and distant ten miles or upwards from any village or township (construing "township" in the sense contended for by the applicant) or any licensed house. It further appeared that for a period of about five years previously to the date of the application for a license, only two dwelling houses existed in the township proclaimed as Currajung, but that several

of the township allotments had been sold, and a mechanics' institute erected. I have no doubt that if I quash Mr. Greenwell's license I shall be depriving travellers who have occasion to pass through the mountainous regions about Currajung of that accommodation which the Legislature in enacting the 25th section intended to enable persons travelling in such districts to procure. The prohibition against granting a roadside license for a publichouse within ten miles of the nearest licensed house on the same road, was designed to prevent the establishment of such roadside houses in places within a reasonable distance from which the necessary accommodation could be obtained elsewhere, and not in places within a reasonable distance from which no such accommodation could be procured. The question is whether the Legislature has expressed the prohibition in terms so stringent as to defeat its own object. According to the dictionaries, a town imports in its general sense a collection of houses larger than a village. But it has several special significations, and amongst them in this colony that of a borough, which has been declared by an order of the Governor in Council to be a town. Similarly a township is defined as the district or territory belonging to a town, and under the Land Acts the term is certainly applied to the territory appropriated by the Governor in Council for a town that is to be created, as well as for one already in existence. But with us "township" is used colloquially to denote any cluster of dwellings from a small town to a hamlet. It is usually qualified by one or other of such adjectives as "large," "small," "good-sized," "considerable," which express in a rough way different sizes. By itself it is more nearly synonymous with village than with any other word, village being a word not at all in fashion in Victoria. In the 25th section of the *Licensing Act*, from the word "township" being connected with but distinguished from village and placed first in order, I conclude that it means an aggregation of dwellings somewhat larger than a village. Perhaps it is because amongst the mountains in Victoria there is no place worthy of the name of town as commonly understood that the word "township" was used in preference. In my opinion the magistrates had jurisdiction to grant the certificate for the issue of a license to Mr. Greenwell and his license is valid. I discharge the rule *nisi* with costs.

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From this decision the Crown appealed.

Box for the appellant—The policy of the Act is to prevent the increase of licenses above the statutory number, which already, as a matter of fact, exists in this district. Besides, this place has already, under the provisions of "*The Land Act* 1884," been proclaimed a township.

Duffy (with him *Serjeant*) for the respondent was not called on.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. The licensing magistrates in this case granted a roadside victualler's license to one William George Greenwell, in the locality of Currajung, under the provisions of sec. 25 of the *Licensing Act* 1890. Their certificate for the issue of the license was brought up on a rule *nisi* for *certiorari*, and the objections taken to the grant of the license were—first, that the licensing magistrates had no jurisdiction to grant or issue the certificate, and, secondly, that upon proof at the hearing that Currajung was a township, the jurisdiction of the licensing magistrates to issue a certificate for a license was ousted. The Court held that the licensing magistrates had jurisdiction to grant this certificate for the issue of a license, and from that ruling this appeal is taken.

The main ground upon which the jurisdiction of the magistrates to issue this certificate for a license has been questioned appears to be that the magistrates, upon the true construction of sec. 25 of the *Licensing Act* 1890, should have held that Currajung, which is situated on the coach road from Rosedale to Yarram Yarram, was not distant 10 miles from a village or township, within the meaning of the above-mentioned section, inasmuch as it is contended that this place Currajung is itself a village or township in law, and consequently that a license should not be granted for a house in this place. It was contended below and before this Court that the word township in sec. 25 must be taken to mean some portion of territory proclaimed as a township under the *Land Act*, and that upon proof being given that Currajung had been proclaimed a township it must be considered to be a township for the purposes of this section, and if the word

wnship" had stood by itself in the section there would be great e in that argument, for where the Legislature, when dealing with tory, uses a certain term, and this term is used in another Act ealing with a question connected with territory, I should be osed to think that the same meaning should be attached to the in the latter case which was given to it in the former, and, efore, I should be inclined to say that the proclamation of a e as a township constituted that place a township. The words in this 25th section, however, are "any village or township," if the word "village" has any meaning in the language here by the Legislature, it must have a meaning different from that h it is contended should be applied to the word township. he word village now stands it can be construed in no other e except in accordance with its popular meaning, and being ed as it is in collocation with the word township, that word also t be given an interpretation according to its popular meaning er than that which might be attached to it if it stood alone. rding to this view the magistrates were bound to consider her Currajung was a township or not in the popular sense of the . The popular meaning of both these words is very indistinct, I do not known whether, in Victoria, there is any real difference een these two words in their popular sense. In the case of tt v. *South Devon Railway Co.* (*a*), where the Court in land had to consider the meaning of the word town in its lar sense, it was only able to suggest that the word meant place containing a number of houses congregated together—nhabited spot where the occupation is continuous." That ription, though it may be common to all three words—wn," "township," and "village"—does not define the ee of continuous habitation applicable to each of these s, and it therefore becomes necessary to determine what village or township. That question the magistrates had to ider in the case before them, and they came to the conclusion this place Currajung, which consisted of two houses and a hanics' institute, was not a township within the meaning of 25 of the *Licensing Act* 1890, and did not come within the ibition of the section, and that therefore a roadside license

(*a*) 2 Ex. 725.

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might be granted for a house situated there, and when the certificate for the issue of a license was brought up, the Court held that the magistrates were not deprived of jurisdiction, and we are of opinion that the Court was right in so holding. The question the magistrates had to decide is one of great uncertainty, but it appears to us that their decision is sufficiently supported by the facts of the case. The practical difficulty arising out of the undoubted policy of the Act suggested by Mr. Box, appears to us to be answered by the terms of the section itself, for though a roadside victualler's license, in respect of all the other conditions, appears to be similar to a victualler's license, it is not the same with respect to renewal. By sec. 25 roadside victuallers' licenses are made renewable on the conditions therein expressed. We are therefore of opinion that the decision appealed from was right, and the appeal must be dismissed.

Solicitor for the appellant: *Guinness*, Crown Solicitor.
Solicitors for the respondents: *Serjeant & Pace.*

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August 3, 4.

IN RE BIEL.

The Licensing Act 1890 (*No.* 1111), *s.* 203—*Certiorari to quash determination of Licensing Court—Privative section—Effect of.*

Sec. 203 of the *Licensing Act* 1890 provides that no determination, order, or proceedings under Part II. of the Statute shall be removed into the Supreme Court for any want or alleged want of jurisdiction, or for any error or alleged error of form or substance, or on any ground whatsoever.

Held, that the effect of this section is to prevent the proceedings of a Licensing Court being reviewed by means of a writ of *certiorari*, notwithstanding that there was a partial or total want of jurisdiction in the Licensing Court.

THIS was an application by Eliza Biel for a writ of *certiorari* directed to the members of the Licensing Court at Maryborough, calling upon them to show cause why their determination should not be removed into the Supreme Court with a view to quashing it.

Eliza Biel was the owner of and joint occupier with her husband of the Railway Family Hotel. By reason of a poll taken under the

ensing Act it was decided to reduce the licensed houses in yborough from twenty-two to ten, and, on the 28th May 1891, otice was served on the husband only, calling upon him to ear before the Licensing Court, to be holden on the 9th June l, and show cause why the Railway Family Hotel should not be ived of its license. No notice to appear before the Licensing rt was served on Eliza Biel. At a subsequent sitting of the rt it was decided to close twelve of the hotels in the district, amongst others, the Railway Family Hotel. Subsequently a Biel, as also her husband, received notice to appoint an rator for the purpose of assisting in the assessment of com- ation, and she, jointly with her husband, did, in fact, appoint rbitrator to act on her behalf, and eventually she, as owner of hotel, was awarded 412*l.* compensation, and her husband, as pier, was awarded 122*l.* 5*s.* Eliza Biel then obtained a rule for a writ of *certiorari* to bring up the proceedings of the nsing Court for the purpose of being quashed, on the ground she not having received notice to show cause before the nsing Court against the deprivation of her license, the whole eedings of the Licensing Court were invalid. The rule was returnable before the Full Court.

Box and *Bryant* for the respondents to show cause—*Certiorari* t applicable as a remedy in this case; it is expressly taken by the sweeping words of sec. 203 of the *Licensing Act* 1890. issue of the writ in a case like this is purely discretionary: v. *Justices of Surrey* (*a*); *Reg.* v. *The Committeemen for outh Holland Drainage* (*b*).

ounsel referred to *Rex* v. *Allen* (*c*); *Reg.* v. *Chantrell* (*d*).

Madden for the applicant to move absolute the rule for writ of *rari*—The 203rd section is merely the ordinary privative n, taking away the remedy of *certiorari*. All that the section is in other words, "*certiorari* shall not be used for the ses for which *certiorari* is ordinarily used." Even when the

(*a*) L.R. 5 Q.B. 466, p. 472.
(*b*) 8 A. & E. 429.
(*c*) 15 East. 333.
(*d*) L.R. 10 Q.B. 587.

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privative section as to *certiorari* exists the writ will issue when there has been either fraud or want of jurisdiction in the inferior court: *Colonial Bank of Australasia* v. *Willan* (*e*). It would be monstrous if a person is not to be able to test the validity of a decision of an inferior court when that court has had no jurisdiction whatever. This Court will do its utmost to prevent such a result.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. We think this is an entirely plain case. It is an application for a writ of *certiorari* by the owner of a licensed house in Maryborough to quash the determination of a Licensing Court made on the 13th June 1891, by which it reduced the number of licensed houses in Maryborough, or purported to reduce the number, from twenty-two to ten, in accordance with the determination of the electors that the number of licensed houses should be reduced to that number. It appears that at the investigation by the magistrates as to what houses should have their licenses withdrawn, the applicant, who was the owner of a licensed house, was not summoned to give evidence on her own behalf, and it is contended that inasmuch as the magistrates, after evidence had been given showing that the wife and not the husband was the owner, had proceeded to determine the case, there was want of jurisdiction in the Court to deal with the question, and that was a want of jurisdiction which will justify this Court in setting aside the decision of the Licensing Court. Sec. 203 of the *Licensing Act* 1890 furnishes, in our opinion, a full and conclusive answer to that contention. That section is as follows:—

"No determination order or proceedings under Part II. of this Act or any amendment thereof shall be removed or removable by *certiorari* or otherwise into the Supreme Court for any want or alleged want of jurisdiction, or for any error of form or substance, or on any ground whatsoever."

It is difficult to conceive what fuller or more effective language could be employed for the purpose of indicating the intention of the Legislature that the determination of the Licensing Court under Part II. of this Act should not be brought

(*e*) L.R. 5 P.C., p 442.

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before the Supreme Court by writ of *certiorari*. It is familiar knowledge that general privative clauses taking away *certiorari* have been found in many Acts of Parliament, and also that notwithstanding such clauses superior courts—the Queen's Bench in England and the Supreme Court in Victoria—have held that these clauses do not deprive the superior courts of jurisdiction to grant *certiorari* to inquire into the validity of the determination of an inferior court where there had been a want of jurisdiction in such court. Either a manifest defect of jurisdiction in the tribunal making the adjudication, or manifest fraud in the party procuring it, is a ground, notwithstanding the ordinary privative clause in an Act of Parliament, for applying to the Supreme Court to question the determination of an inferior court. "Want of jurisdiction" is defined by the Privy Council in the *Colonial Bank of Australasia* v. *Willan* (*f*), where the Court says:—

"There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry."

Every kind of want of or excess of jurisdiction is a ground for *certiorari* going in the case when the ordinary privative clause only exists. But this section is, in our opinion, intended to cover that very case, and to prevent in any case where a total or partial want of or excess of jurisdiction appears in any inferior court, the proceedings of that court being reviewed by means of this writ. It was admitted in argument that no section in any other Act of Parliament can be found which contains words so strong as these are. It was suggested to the Court that it should struggle against giving its obvious interpretation to this section in order to prevent an alleged injustice being done. Speaking for myself, I protest against such a suggestion. This Court has not to struggle against the plain meaning of an Act of Parliament, it has to obey it and to carry it out. If it were not that this Court were bound by long established decisions, I myself should be disposed to give a wider interpretation than is ordinarily given to many of the privative sections which appear in numerous Acts of Parliament. But when

(*f*) L.R. 5 P.C., at p. 442.

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an Act of Parliament inserts words to meet the very case in point, I think we should be violating our duty if we were to attempt to struggle against the plain meaning of that Act. The order will be discharged. The applicant has failed to show that the ordinary course as to costs should not be taken, and we are of opinion that on the materials before us there appears to have been acquiescence on her part in the decision of the magistrates which disentitles her to any indulgence on this point. The rule will be discharged, with costs.

Solicitor for appellant: *Major* for *Warton*.
Solicitor for respondent: *Guinness*, Crown Solicitor.

A. F. M.

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August 8.
Hodges, J.

[IN CHAMBERS.]

YOUNG *v.* TURNER AND OTHERS.

Interrogatories—"Rules of the Supreme Court 1884"—*Order XXXI., rr.* 25, 26—*Several defendants—Deposit of* 5*l.—Dispensing with payment—Discretion—Practice.*

A plaintiff who brings an action against several defendants in respect of separate as well as joint causes of action, where the defendants have severed in their defences, and appeared by different solicitors, is not entitled to deliver interrogatories to the defendants without paying the sum of 5*l.* into Court in respect of each set of interrogatories.

THIS was an application on behalf of the plaintiff under Order XXXI., rr. 25 and 26, for leave to deliver interrogatories to the defendants upon payment into Court of the sum of 54*l.* 10*s.*, and that payment into Court of any further sum in respect of the interrogatories might be dispensed with. The plaintiff, as trustee under a deed of dissolution for the winding up of The Fourth Industrial Building Society, sued the six defendants as directors of the society for damages in respect of negligence, misfeasance, and breach of trust as such directors. The claim charged each of the defendants with separate and distinct acts of negligence and misfeasance, and likewise charged them all jointly in respect of the same. The interrogatories sought to be administered were very voluminous, and the sum of 54*l.* 10*s.* represented the amount payable in respect of one set of interrogatories. The interrogatories

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directed to all the defendants, some of the defendants being ired to answer certain specified interrogatories, and others in other specified interrogatories, and all of them being ired to answer the majority of the questions. All the defendants ed in their defences, three of them appearing by separate tors, and three of them by the same solicitor. The defences sted of a general denial of all the acts charged, and of ical defences as to the validity of the deed of dissolution.

Moule for the plaintiff in support of the application—This cation is made in a double aspect—first, that under r XXXI., r. 26, payment in respect of one set of interrogatories that can be required; and, secondly, if that contention be g, that further payment may be dispensed with under the etion given to the Court by rule 25. In *Smith* v. *Reed* (*a*), action against several defendants, the Court ordered separate ents to be made in respect of each set of interrogatories, but ould appear from the remarks of Field, J. (who decided that , in the case of *Eder* v. *Attenborough* (*b*), that the interroga- s in *Smith* v. *Reed* were separate and distinct sets. In v. *Attenborough* the defendants delivered a joint defence, and Court ordered payment of one sum only. The expense in ering would be the same whether the defendants severed in defence or not. It was also decided in that case that the ent into Court was not for the purpose of giving security for efendants, but to prevent the abuse of delivering useless and ious interrogatories. In that case the defendants were required swer in the same form as in the present case. In the case of rpool *Engineering Company* v. *Firth* (*c*), Stirling, J., said that practice in England has always been to require separate ent in accordance with the decision in *Smith* v. *Reed*, and he ed in that case separate payments to be made, as there were al defendants who appeared by separate solicitors. In *Joyce* v. (*d*), where the plaintiff brought an action for one and the cause against several defendants, he was held to be entitled to very from all of them on payment of one sum of 5*l*., even

(*a*) W.N., 1883, p. 196.
(*b*) 23 Q.B.D. 130.
(*c*) 1891 1 Ch. 367.
(*d*) 1891 1 Q.B. 549.

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though they severed in their defence. The words of the rule 26 are plain in themselves, and provide that "any party" seeking discovery shall pay the sum of 5*l*. The plaintiff is a "party," and the only party seeking discovery, and if the rule meant to provide for separate payments it would have said so in so many words.

[HODGES, J. This action really amounts to several actions, and the words "any party" may be read with respect to each separate action.]

That is the construction put upon the words in *Joyce* v. *Beall*, but there seems to be no practical reason for such a construction. Stirling, J., decided the case of *Liverpool Engineering Co.* v. *Firth* simply as a question of practice founded upon *Smith* v. *Reed*. The judge has discretion under rule 25 to dispense with any further payment beyond the one sum: *The Whickham* (*e*); *Newcome* v. *London Engineering Co.* (*f*).

P. D. Phillips for the defendants J. H. Turner, J. Turner, and Moore—There are no merits in the plaintiff, and there is no reason why the judge should exercise his discretion in favour of the plaintiff. As the interrogatories are so voluminous, some protection as to costs should be given to the defendants.

Johnson for the defendant Clarke—The defendants have all severed their defences, and are clearly within the decision of *Smith* v. *Reed*.

Irvine for the defendant Collis—The primary causes of action are against particular defendants for separate and distinct charges of negligence. All the cases are clear that where the defences are separate and distinct, and the parties appear by different solicitors, the party seeking discovery by interrogatories must pay in a separate sum in respect of each set of interrogatories. If the defences be joint then the rule is otherwise applied. The principle is that if the defendants have a right to defend separately, they have a right to have security for each set. The payment into Court is by way of security: *Cooke* v. *Smith* (*g*). The words "any party" in rule 26 must be taken with reference to each separate

(*e*) 53 L.T. 236. (*f*) W.N., 1890, p. 52. (*g*) 1891, 1 Ch. 509.

e of action, so that the plaintiff is "a party" in each cause of n which he has against the defendants separately. The mere of mixing the interrogatories by asking questions relative to oint as well as the separate causes of action cannot entitle the tiff to get rid of his obligation "to pay more than one sum of to Court."

Moule in reply.

HODGES, J. In this case there is one plaintiff and there are defendants. There is a joint cause of action against the dants, and there are several causes of action against the dants separately. The plaintiff applies under Order XXXI., 5 and 26, that he may be at liberty to deliver interrogatories e payment into Court of one sum of 5*l.* together with 10*s.* per in respect of one set of interrogatories only. He contends, e first place, that rule 26 does not authorise the Court to order , that this is all that he can be required to pay under that rule, it is put for the plaintiff that he comes within the words party seeking discovery by interrogatories shall, before ery of interrogatories, pay into Court, etc.," that is, that he is arty" seeking discovery, and has only to pay 5*l.* into Court. might be the strictly grammatical construction of that rule, n my opinion we have to so construe it as to make it applicable mplicated proceedings which are frequently brought under the *cature Act*. In my opinion, in applying that rule to delivery terrogatories, we have to remember that in one proceeding there be tried causes of action only between one plaintiff or set of tiffs and one defendant or set of defendants, and also, though e be only one proceeding, there may be tried causes of action een the plaintiff or plaintiffs, and one defendant or set of defen-s, and also causes of action between the same plaintiff or plaintiffs another defendant or set of defendants. In this latter case the tiff is a party to a proceeding against the one defendant or set fendants, and is also a party to a proceeding against the other ndant or set of defendants, and two sums of 5*l.* have to be paid Court under Order XXXI., r.26, as it is really a case of two ns being tried between different parties in one proceeding.

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In this case the sum of 5*l.* will have to be paid with respect to the proceedings that are being taken against the several persons independently so to speak. That is, so far as regards the separate cause of action against one person, 5*l.*, and so far as regards the separate cause of action against another person, another 5*l.*, and so on. My construction of rule 26 being against the plaintiff, it is necessary to consider rule 25. The words in rule 25 "shall unless otherwise ordered by the Court or judge," clearly give to the Court or judge a discretion in the matter, and the question is whether I ought, in this case, to exercise the discretion in favour of the plaintiff. I do not see any special circumstances that entitle him to peculiar consideration. The actions or the action he is taking has required, and I cannot say has not properly required voluminous interrogatories; but as they must be voluminous I think the amount to be paid into Court should in some measure be proportionate. I am not prepared to say whether there are demerits in the defendants or special merits in the plaintiff, and I do not think that I ought to exercise my discretion in favour of the plaintiff. The proper order to make is to order that the plaintiff be at liberty to administer these interrogatories on payment of 5*l.* and 10*s.* for additional folios with regard to each set of defendants who have defended separately. As the authorities are not very clear upon this point I shall make the costs of the application costs in the cause.

Moule—Three defendants have appeared in the action by one solicitor, does Your Honor order separate payments to be made in respect of each of the defendants?

HODGES, J. No; I think there must be payments made in respect of four sets of interrogatories.

Solicitors for plaintiff: *Moule & Seddon.*

Solicitors for defendant Collis: *Abbot, Eales & Beckett.*

Solicitors for J. H. Turner, J. Turner, and Moore: *Fink, Best & P. D. Phillips.*

Solicitors for Clarke: *Smith, Emmerton & Johnson.*

Solicitors for Francis: *Attenborough, Nunn & Smith.*

W. H. M.

LINDO *v.* PRESSER.

1892
August 14, 25.

Hodges, J.

Practice—Refreshers to counsel—"Rules of the Supreme Court 1884"—*Order LXV., r. 27, sub-r.* 48—*Meaning of word "day."*

A trial began on a certain day and was concluded on the next day. During the two days the trial lasted for eight hours and ten minutes.

Held, that the taxing officer had no discretion to allow a refresher.

"Day" in rule 27, sub-r. 48, of Order LXV., means a day of the week or month, not a day of five hours.

The Courier (1891, P., 355) dissented from.

THIS was an application to review a decision of the taxing officer.

The facts appear fully in the judgment.

Davis in support.

R. W. Smith to oppose.

The following authorities were cited:—*Walker* v. *Crystal Palace District Gas Co.* (*a*); *The Courier* (*b*).

Cur. adv. vult.

HODGES, J. In this case the taxing officer has disallowed certain refreshers to counsel. He has disallowed them, as I understand his reasons, because he has no discretion or authority to allow them. The applicant says that he is wrong, and that he has a discretion to allow them. The question is which view is right. The trial commenced at a quarter past twelve p.m. on the 31st of May, and continued until ten minutes past three p.m. on that day. It was then adjourned until the next day, when it was resumed at half-past ten a.m., and was concluded at a quarter to four p.m. on the second day. It lasted during the two days eight hours and ten minutes, and the taxing officer, under these circumstances, says that he has no discretion to allow refreshers to counsel. His authority to allow refreshers depends upon the proper construction of Order LXV., r. 27, sub-r. 43. If that sub-rule does not give the taxing officer authority to allow the refreshers, then he has no authority to do so. The rule is, no doubt, difficult to construe, as evidenced by conflicting decisions on the subject. I

(*a*) 1891, 2 Q.B. 300. (*b*) 1891, P. 355.

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propose first to examine the construction of this sub-rule apart from the authorities, and I think the first thing to be determined is the meaning of the word "day" in this sub-rule, as it has been suggested that it means a day of five hours. In construing any document, whether it be a deed, an Act of Parliament, or a rule, there is what has been called the golden rule of construction; that is, that the same meaning should be given to the same word wherever that word occurs in the one document, so far as the circumstances and surroundings of the case will allow, and I think that that rule may be applied to the construction of the word "day" in this rule. The word "day" occurs several times in this sub-rule, and if the meaning of the word is made clear in one part of it, I think that will show what the meaning of the word is where it appears in another part, unless the context prevents a similar construction being applied. Now this sub-rule provides—

"If the trial shall extend over more than one day, and shall occupy on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours"—

Now, stopping there, and, in place of the word "day," reading in the words "day of five hours," as has been suggested to be the meaning of the word "day," the sub-rule will read—

"If the trial shall extend over more than one day of five hours, and shall occupy on the first day of five hours only, or partly on the first day of five hours and partly on a subsequent day or days of five hours, more than five hours"—

That, to my mind, is nonsense, and shows that that cannot be the meaning to be attached to the word "day" in that part of the sub-rule, and there is nothing in the other part of the sub-rule, either, to show that such a meaning should be attached to the word. I take it that that is not the meaning of the word in either part of the sub-rule. I think that the first part of the sub-rule shows that "day" means day of the week, month, and year. If that be the meaning of the word day, then, coming to consider the construction of the rule, it will read as follows:—

"If the trial shall extend over more than one day (that is, day of the week) and shall occupy either on the first day (that is, day of the week) only, or partly on the first and partly on a subsequent day or days (that is, of the week) more than five hours without being concluded, the taxing officer may allow for every clear day (of the week) subsequent to that (day of the week) on which the five hours shall have expired, the following fees."

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So that, according to my construction, the taxing officer has no authority to allow refreshers unless the trial shall have extended over to a day of the week subsequent to the day on which the five hours shall have expired. In this case the trial concluded on the day of the week on which the five hours expired, and therefore in my opinion the taxing officer was right in coming to the conclusion that he had no authority to grant or allow a refresher.

I desire also to say a few words about the word "clear" which occurs in this sub-rule, because several meanings have been suggested, though my remarks on this point will be merely *obiter dicta*. A clear day, that is, day of the week, I understand to mean a day clear of that day on which the five hours have expired. I don't apprehend it to mean a full day, though even if it did the taxing officer's decision would still be correct, but I take it to mean a day clear of and subsequent to the day of the week on which the five hours expired. I think it would be most dangerous to hold that a clear day meant a full day of five hours, as such an interpretation would introduce into the practice of marking refreshers the very dangerous practice of marking them at the conclusion of the case, whereas according to the whole of the traditions of the profession these fees should be marked before the work is done, and before the day commences, and not after. If "clear" means full day in this sub-rule, it would follow almost necessarily as a matter of course that refreshers could not be marked until after the day had ended. The decision in this case is precisely in accord with the decision in *Walker* v. *Crystal Palace District Gas Company* (*c*), though I cannot say that all the observations that I have made are in accord with the observations made in that case. The Court in that case avoided giving an opinion upon the matter upon which I have thought it desirable to give an opinion for the assistance, in subsequent cases, of the taxing officer. A later case, *The Courier*, reported in 1891, P., 355, is at variance with the case in the Divisional Court of the Queen's Bench, as also with the conclusion at which I have arrived. Mr. Justice Butt in that case does not in his judgment examine the language of the rule, or show how he arrives at his conclusion, beyond dismissing the appeal from the taxing officer. I think his words are:

(*c*) 1891, 2 Q.B. 300.

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"I uphold the decision of the assistant registrar and dismiss the appeal with costs." But the illustration which he gives of the result of the construction of the rule that was contended for before him does conflict with the view which I have expressed to be the true meaning of the sub-rule, and consequently the hardship of the case which he puts does not upon my construction fall within the sub-rule as on my view; in that case a refresher would have been allowed. I desire further to say that the language of the taxing officer, given in the note to the report of the case in 1891, P., at p. 356, is at variance not only with the decision in the Divisional Court of the Queen's Bench, but with what I have said, and I think also that it is in direct conflict with the several words in the sub-rule. In the first place, he held that the word "clear" (day) meant a day of five hours, and that the sub-rule allowed him to give for every day of five hours the fees mentioned in the sub-rule. In the case before him there was not a day of five hours, and yet he proceeded to allow a portion of the sum mentioned in the sub-rule, but the sub-rule does not authorise, even if day meant a day of five hours, any payment for a portion of a day. The difficulty that I find in agreeing with that construction is that it either gives the go-by to the word "clear" or the word "subsequent." And I think that it is my duty to give effect, as far as possible, to every word in the sub-rule. It was urged that the construction at which I have arrived is at variance with the latter portion of the rule, which deals with cases in which the evidence in chief is not taken *viva voce*. There is no doubt that there is some language used in the latter part of the sub-rule which shows that it is possible that the framers of it may have meant something different from that which is meant by the first part, but it does not from the language used necessarily follow that they did. The latter portion of the rule provides—

> "The like allowances may be made where the evidence in chief is not taken *viva voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used."

The words "like allowances" carry us back to the allowances authorised by the first part of the rule, and I think that the two parts may be read together, and in accordance with the view which

have expressed, although at first sight it might seem as if the king officer was authorised to allow a refresher at the expiration five hours. That construction, however, would be altering the b-rule altogether, and would make it read as if the words had en "like allowances may be made for every five hours subsequent the first five hours," instead of on a day subsequent to that on ich the five hours shall have expired. I think, therefore, that e summons must be dismissed, but, on account of the conflict in e decisions, without costs.

Solicitors for plaintiff: *Chambers & Simons.*

Solicitors for defendant: *McCutcheon & Bruce*, for *Trumble Binney.*

A. F. M.

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minal law—Perjury—Evidence given coram non judice—Police Offences Act 1890 (*No.* 1126), *s.* 41, *sub-sec.* 12—*Frequenting a place of public resort with intent to commit a felony.*

A prisoner was charged with being a suspected person "frequenting a public ce, to wit, Elizabeth Street, with intent to commit a felony." The prisoner ted to give evidence on his own behalf at the hearing before the justices, and subsequently prosecuted for perjury committed in thus giving evidence.

It did not appear that any evidence was given to prove that Elizabeth Street was place of public resort."

Held, that as there was no such offence under the *Police Offences Act* or any other as that with which the prisoner was charged, viz., of frequenting "a public ce" with intent to commit a felony, his evidence was given *coram non judice*, and t he could not therefore be convicted of perjury.

SPECIAL CASE stated for the opinion of the Full Court.

This was a case stated by Hood, J., under the provisions of s. 481 of the *Crimes Act* 1890. The following were the facts ted:—In this case the prisoner had been charged in the police urt for "being a suspected person frequenting a public place, to t, Elizabeth Street, Melbourne, with intent to commit a felony," d during the hearing of the charge he gave evidence on his own half. He was convicted on this charge as set out. He was then, the Supreme Court, prosecuted for perjury alleged to have been mmitted while so giving evidence, and on the trial before me at

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Melbourne during the last June sittings, a question of law arose as to whether the police court had any jurisdiction to convict the prisoner as aforesaid, and whether perjury could be committed in such a proceeding. No evidence was taken before me of what occurred in the police court proceedings except what may be gathered from the affidavits hereto annexed (which, however, were not put in as evidence of what took place there, but only to contradict a witness, Dalton), and from the police court record, a copy of which is hereto annexed. The jury having convicted the prisoner, I have reserved such question of law for the consideration and determination of the judges of the Supreme Court, and have postponed judgment until such question of law shall have been considered and determined. Sec. 41, sub-sec. 12, of the *Police Offences Act* 1890 was referred to, and the case of *Reg.* v. *Timson* (*a*) was cited.

Forlonge for the prisoner—The whole proceeding before the justices was *coram non judice*. There is no such offence as "being a suspected person frequenting a public place with intent to commit a felony." The words of the Act—*Police Offences Act* 1890 (No. 1126), sec. 41, sub-sec. 12—refer to "a place of public resort," but a "public place" is not necessarily "a place of public resort." The justices had no jurisdiction to hear the case, and had no jurisdiction to administer an oath upon such a charge, and therefore a presentment for perjury for swearing falsely in such a proceeding will not lie: *Reg.* v. *Willis* (*b*); *Reg.* v. *Charles* (*c*).

Upon the construction of the Act counsel referred to *Reg.* v. *Timson* (*a*).

Counsel was stopped by the Court.

Finlayson for the Crown—The justices had jurisdiction to hear the case in the first instance; there is no doubt that the charge was framed under sub-sec. 12 of sec. 41 of Act No. 1126. It is not necessary to formulate the charge in the exact words of the section; the prisoner knew what he was charged with, and did not take any objection nor exercise his right of having the case adjourned. The justices could not have declined to hear the case; it was for them

(*a*) L.R. 5 Ex. 257. (*b*) 12 Cox 164. (*c*) 3 W.W. & A'B. (L.) 52.

lecide whether "Elizabeth Street" was "a place of public rt." The justices were bound to hear the charge in the absence ny objection, to see whether "Elizabeth Street" was "a place ıblic resort," and if there was jurisdiction to entertain the case l, it cannot be said that the proceeding was *coram non judice*. oath was administered by a competent tribunal, and the entment for perjury will lie. If the charge be vaguely drawn defendant can always object, and the information can then be nded: *Reg.* v. *Hare, exparte Newport* (*d*).

[HIGINBOTHAM, C.J. The justices have power to hear evidence charge of a particular offence, but I know of no authority h decides that they have power to hear evidence on something h is not a criminal offence at all. Before they can give them- s jurisdiction to act upon evidence, and convict upon it, the ge must be a charge authorised by law.]

n *Reg.* v. *Hughes* (*e*) it was held that justices had power to a charge, although the warrant upon which the accused was ght before them was illegal.

HIGINBOTHAM, C.J., delivered the judgment of the Court GINBOTHAM, C.J., A'BECKETT and HOOD, JJ.] The prisoner charged in the police court with being "a suspected person ıenting a public place, to wit, Elizabeth Street, with intent to nit a felony." That is not a charge of a crime or an offence in sec. 41, sub-sec. 12, of the *Police Offences Act* 1890, nor in any other Statute. The prisoner elected to give evidence on own behalf, and he was charged before the Supreme Court with ıry in the statements which he made in giving evidence upon in the police court. Inasmuch as the justices had no juris- on to hear this particular charge, which was not a charge of a inal offence, it follows that the prisoner was not giving evidence *m judice*, and therefore he cannot be convicted for perjury in ıg such evidence, although he purported to give it upon oath. desire that it should not be understood that in so holding we imiting the power of justices either to hear particular charges amend the charge brought before them, or to deal with cases h come before them and which are within their jurisdiction to

(*d*) 13 V.L.R. 310.

(*e*) 4 Q.B.D. 614.

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deal with. It may be that in this case the justices have had jurisdiction; it may be that evidence was given before them which satisfied them that "the public place" referred to was a place of public resort within this section, and that upon that evidence being given they would have been justified in convicting the prisoner of frequenting a place of public resort with intent to commit a felony. At the trial in the Supreme Court, and in this Court, no such evidence was produced. All that we have before us is that the prisoner was charged in the Court below with something which is not an offence, and that being so it follows necessarily that he could not be convicted of perjury in giving evidence in answer to such a charge. We think that the conviction must be quashed.

Conviction quashed.

Solicitor for prisoner: *Brayshay.*

Solicitor for Crown: *Guinness*, Crown Solicitor.

W. H. M.

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MACHIN *v.* SYME.

Building contract—Final certificate of architect.

By a condition under a building contract it was provided that "payment shall be made to the contractor at intervals during the progress of the works at the discretion of the architect, upon certificates in writing under his hand, at the rate of 75 per cent. on the value of the works executed . . . . 25 per cent. shall be paid after the architect has signed a certificate that the contractor has executed and completed the works to his satisfaction. . . . ."

The architect upon the completion of the works, and knowing at the time that there were disputes between the contractor and the proprietor, gave the following certificate, addressed to the proprietor:—

"I hereby certify that M., contractor, is entitled to receive the sum of 660*l.* 19*s.* 10*d.* as final payment of contract and extras in erecting residence at St. Kilda. This certificate is issued subject to any counterclaim you may have against M., this being the final instalment."

The contractor brought an action against the proprietor under this certificate, claiming the amount certified therein, and the defendant put in a counterclaim for damages for not doing the work according to the plans and specifications, and for omitting certain work, and for doing a portion of the work in a negligent and improper manner.

Held, affirming judgment of Williams, J., that the certificate was a final certificate, and that the plaintiff was entitled to recover the amount claimed, and further that the defendant was precluded from setting up any counterclaim as to matters arising under the contract.

APPEAL from judgment of Williams, J.

This was an action brought by the plaintiff, Thomas Machin, to recover from the defendant, J. C. Syme, the amount of 711*l.* 17*s.*, being the amount due under a building contract. Portion of this amount, 660*l.* 19*s.* 10*d.*, was claimed under a certificate from the architect, D. C. Askew, and the remainder was claimed for work done and materials supplied at the request of the defendant. The certificate was in the following form :—

"28th July 1891.

"To J. C. Syme,—I hereby certify that Mr. Thomas Machin, contractor, is entitled to receive the sum of 660*l.* 19*s.* 10*d.* as final payment of contract and extras in erecting residence at St. Kilda. This certificate is issued subject to any counterclaim you may have against Mr. Machin, this being the final instalment. DAVID C. ASKEW, architect."

The defendant in his defence alleged that the architect had never signed a certificate that the plaintiff had executed and completed the works to his satisfaction within the meaning of the 21st condition of the contract, and that the said alleged final certificate was not a final certificate within the meaning of condition No. 21. The defendant also disputed certain items in the claim. The defendant set up a counterclaim for damages for not doing the work according to specifications, and for omitting certain work, and for doing a portion of the work in a negligent and improper manner. The plaintiff, as to the counterclaim, contended that the architect's certificate was conclusive, and that the matters alleged could not be raised by way of counterclaim in this action.

Condition 21 of the contract was as follows :—

"Payment shall be made to the contractor at intervals during the progress of the works at the discretion of the architect, upon certificates in writing under his hand, at the rate of 75 per cent. on the value of the works executed, in sums of not less than 500*l.* at a time. Twenty per cent. shall be paid after the architect has signed a certificate that the contractor has executed and completed the works to his satisfaction, and the balance of 5 per cent. shall be reserved for the period of one month from the date of the certificate of completion in order to ensure the execution of any reinstating or repairs that may be required by the architect during the above period, and which works shall be performed to the satisfaction of the architect before the contractor shall be entitled to receive the said balance, and the contractor shall not be entitled to receive any payment whatsoever, whether progress or final, except upon the certificate of the architect."

The action was tried before Williams, J., without a jury. The certificate in the form set out in the claim was put in evidence and marked "D," and was proved to have been sent to the defendant.

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The architect deposed that the work under the contract was done to his satisfaction, and that it was properly done. He admitted that, before giving the alleged final certificate, the defendant had told him that he had claims against the plaintiff, and asked him not to give the certificate. The plaintiff, in the beginning of July 1891, asked Askew for a certificate, and he replied that he was not authorised to give him one, and the plaintiff then said that he would have to make him, the architect, a party to an action. Subsequently Askew gave the plaintiff the certificate, exhibit "D." Exhibit "F," referred to in the judgment of the learned primary judge, was an account prepared by Askew and forwarded to the defendant. Exhibit "H" was a letter of the 28th July 1891, sent by Askew to the defendant, and was in the following words:—

"In answer to yours of the 23rd inst., and in compliance with the request therein contained, I now enclose you an amended statement of account between you and Mr. Machin, supplemented to that of the 16th inst. You will see that I have corrected the amount of the original tender and have also added the sum of 100*l.* for the entrance gates, as you will, no doubt, remember that on three distinct occasions you expressed yourself to me that you had no wish to take advantage of the mistake that had occurred in respect of the gates; that you had other ways of making 100*l.* without taking it out of Machin, and that you would pay for the gates. It was only on this assurance conveyed by me to the contractor that he would proceed with the gates. The statement of accounts dated 16th and 28th July, furnished by me to you, are, to the best of my knowledge and belief, true and equitable, and as far as I am concerned, they are final, as I do not consider it to be part of my professional duties to act as private clerk or accountant at any one's dictation. The contractor has been furnished with copies of the statements of the 16th and 28th July, and I have this day forwarded to him a final certificate for the sum of 660*l.* 19*s.* 10*d.* (accompanied by a letter a copy of which I enclose). This certificate to be subject to any counterclaim which you may have against him. Consequently any claims on account of delay, deductions, or omissions you may have against him will be rendered to him direct against the certificate issued without my intervention."

The following was the letter, exhibit "G," referred to in exhibit "H," which was sent by Askew to Machin with the final certificate:—

"Herewith I forward you a certificate for 660*l.* 19*s.* 10*d.* as final payment on account of contract and extras in erecting residence at St. Kilda for J. C. Syme. As Mr. Syme has intimated to me that he has claims upon you for delay and for other deductions and omissions than those shown in my statement of accounts, dated 16th and 28th July, the certificate is issued subject to his counterclaims, an account of which he will render to you direct without my intervention."

n the contract between the parties there was the following
e :—

The contractor will deliver up the building to the proprietor in perfect repair, and in good condition, when complete, and to the entire satisfaction of the ect. The passing or certifying of any work by the architect shall not exempt ntractor from liability to replace the same if it be afterwards discovered to have lone not in accordance with plans and specifications, either in workmanship or ials. On the contractor satisfactorily performing his part of this contract the etor agrees to pay him the sum of 8,900*l.*, the money to be paid in accordance lause No. 21 of conditions of contract signed or initialled by the contractor."

he learned primary judge ordered judgment to be entered for laintiff for the amount certified to be due under the certificate, directed judgment to be entered for the defendant on his erclaim for 42*l.* 5*s.* in respect of certain items which the tiff admitted being due. These items comprised in the sum *l.* 5*s.* had nothing to do with the general claim for damages ined in the counterclaim. The learned judge held that the icate was binding on the defendant and conclusive as to all rs under the contract, and he refused to allow the defendant into the counterclaim for damages. The following judgment elivered :—

ILLIAMS, J. Though I have given judgment in this case in dance with an intention expressed at the time, I proceed now te the reasons for my judgment.

he plaintiff, a contractor, sued the defendant (1) for a balance or the building of a house, as under a final certificate given e defendant's architect, D. C. Askew; (2) for the value of s ordered by the defendant personally. The balance repre- l by the so-called final certificate included a balance due for act work and the value of extras ordered by the architect, but n writing. The defendant contended that the document a final certificate was not a final certificate under the 21st tion of the contract, that the extras comprised in it had not een ordered in writing as provided by condition 6, that the was not done in accordance with plans and specifications, and erclaimed for penalties and damages for negligent execution work and other minor matters. The points upon which the and defence substantially rested were (1) whether the nent marked "D" was or was not a final certificate under

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condition 21, and (2) if it was, what was its effect? And I, therefore, with the consent of counsel on both sides, took all the evidence bearing on the these points first, as my decision upon them would materially limit the case upon either side.

I think the document marked "D" is a final certificate under the contract, and were it not for the unfortunate insertion in it of the words, "This certificate is issued subject to any counterclaims you (the defendant) may have against Mr. Machin" (the plaintiff), I should have had little doubt in holding that not only was it a final certificate under the contract, but that its effect was to conclude both parties as to every matter comprised in it over which the architect had jurisdiction, and, as a consequence, to preclude the defendant from alleging either that the work was not done in accordance with plans and specifications, or that it was negligently executed. Then what is the meaning and effect of the words so inserted in exhibit "D"? I think it is impossible to decide this without looking at the surrounding circumstances, the evidence of the contractor and the architect, the account exhibit "F," and the letters "G" and "H," and the account enclosed with "H." I exclude from my consideration the statement made by the architect and objected to, "When I gave this exhibit 'D,' I intended it as my final certificate under the contract," being doubtful whether that statement can be regarded as evidence. Looking, however, at the other evidence to which I have referred, I think document "D" is the architect's final decision and certificate under condition 21. It is true that it does not state that the contractor has executed or completed the works to his (the architect's) satisfaction, but if "D" be the final certificate that omission is immaterial, as the fact is necessarily implied, and as a fact the architect swears that he was completely satisfied with the execution of the works. It appears to me that the question as to whether this document "D" is the final certificate under the contract is a mixed question of law and fact, and having regard to the other documents and to the evidence to which I have referred, I think and find that "D" is what the plaintiff alleges it to be—the final certificate. In giving it the architect discharged his last function under the contract, and when he gave it he washed his hands, so to speak, of both parties and all claims which the one preferred against the other, other than

e with which he had dealt, and the unusual words which he added to his certificate to my mind only mean this: "You employer) say that you have other claims against the ractor; I know nothing of them and cannot understand them, cannot deal with them. This is my final certificate, and, as s I am concerned, it is final as to all matters with which I dealt, but if, notwithstanding this certificate, you can maintain other claims which you say you have against the contractor, must prefer them directly against him; I cannot recognise or tain them." Then if "D" be the final certificate what is its so far as this action is concerned? I think it is, in the first , conclusive that the work had been properly executed and pleted according to the plans and specifications, and to the itect's satisfaction. If so, this disposes of the defendant's right ontend that the work was not so executed or that it was gently executed. In the second place, I think it enables the tiff to get payment from the defendant to the amount of . 19*s.* 10*d.* for the contract work and extras comprised in it, that, as to those extras, it supersedes the necessity for the uction of orders in writing. As regards the plaintiff's claim xtras ordered by the defendant, his counsel abandoned these e hearing so far as regards the recovery of their value. As rds the disputed item of allowance of 100*l.* to the contractor he erection of front entrance gates, the defendant by his counsel eded that this ought to be allowed to the contractor, so it is cessary for me to consider whether the final certificate is or is conclusive as to this item. As regards the claim for the r cent. being premature, the defendant (assuming that "D" he final certificate) by his counsel agreed that the plaintiff's n as regards this 5 per cent. should be considered as not being naturely brought. [His Honor then dealt with other items, but his report deals merely with the effect of the certificate exhibit " it is not necessary to set out the remaining portion of the ment.]

From this judgment the defendant now appealed. The plaintiff, re the appeal came on for hearing, assigned the judgment to

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The Mercantile Finance and Agency Company, who became the respondents to the appeal.

Mitchell for the appellant—The certificate given by the architect was not a final certificate. It merely certified that the balance due under the contract, together with certain extras, was 660*l.* 19*s.* 10*d.* So far as any legal effect is concerned, the certificate was useless. It is expressly made subject to a counterclaim by the defendant against the plaintiff, and yet, if it be held to be final, its effect is to shut the defendant out from any relief whatsoever. By condition 21 under the contract the architect in his final certificate has to certify "that the contractor has executed and completed the works to his satisfaction." This condition should be contained in the certificate itself, and cannot be implied or supplied by parol evidence. The mere fact that documents are produced showing that the architect is satisfied with the work is not sufficient: *Morgan* v. *Birnie* (*a*). The contract between the parties contains this clause: "The passing or certifying of any work by the architects shall not exempt the contractor from liability to replace the same if it be afterwards discovered to have been done not in accordance with the plans and specifications either in workmanship or materials." The certificate relied upon cannot relieve the contractor from all responsibility under the contract when it is expressly made "subject to any counterclaim" which the defendant may have. According to the words of the certificate the defendant was to be at liberty to show that the work was not properly done, and subject to that the architect certifies that the balance owing to the contractor is the sum mentioned therein.

Counsel referred to the following cases:—*O'Keefe* v. *The Board of Land and Works* (*b*); *Clarke* v. *Murray* (*c*).

Madden (with him *Isaacs*) for the respondents—The certificate purports to be a final certificate, and, if so, it binds the defendant and precludes him from attacking the work done under the contract. If it be ambiguous in its terms, then parol evidence may be given to explain its meaning, and the evidence is clear that the architect

(*a*) 9 Bing. 672. (*b*) 1 A.J.R. 145. (*c*) 11 V.L.R. 817.

intended it to be final and conclusive. The concluding clause was unnecessary, and merely amounts to an intimation that if the defendant has any claim outside the contract then he may assert such claim. A certificate is final if it be intended to be final, although its form does not show that it is actually final.

Counsel referred to the following cases:—*Goodyear* v. *Weymouth* (*d*); *Harvey* v. *Lawrence* (*e*).

Mitchell in reply.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.] We concur with the judgment of the learned primary judge in this case. We think that this document of the 28th July 1891 is a document which on the face of it is a final certificate of the architect. The document expresses the opinion of the architect that the works executed by the contractor under the contract have been executed and completed to his satisfaction. He has added words which have created some difficulty and uncertainty as to what his intention was with regard to the same. Whether or not he intended the words to mean that, although he was satisfied, he preferred to leave the defendant to make any claim which he could against the contractor, the consequence of the certificate being a final certificate and expressing the satisfaction of the architect as to the completion of the works is that the defendant cannot make such a counterclaim as he now seeks to put forward. These words appear merely to have been meant by the architect to amount to this, that so far as he was concerned, he would leave the defendant to make any claim if the law allowed the defendant so to do. We also concur with the view expressed by the judge, that if this statement at the end of the certificate should be regarded as ambiguous and therefore parol evidence was admissible as to the true meaning of it, then the general effect of it is that the architect intended to say to the employer: "You say you have other claims against the contractor; I know nothing about them, and so I cannot deal with them; this is my final certificate, and so far as I am concerned it is final as to

(*d*) 35 L.J. C.P. 12. (*e*) 15 L.T. (N.S.) 571.

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all matters." That view contains a mixed question of law and fact, and there is evidence on both sides as to its proper meaning and as to the facts, and we will not disturb the finding of the judge on this question of law and fact which he has disposed of. We think, therefore, on both points, whether taking the certificate by itself, or whether it be viewed as an ambiguous document in connection with the evidence adduced as to its meaning, that it is a final certificate binding on the parties, and conclusive as to the right of the plaintiff to recover the amount which it purports to certify as being due. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *J. M. Smith, Emmerton & Johnson.*
Solicitors for respondent: *Cleverdon, Westley & Dale.*

W. H. M.

1892
August 22, 23.
Hodges, J.

[IN CHAMBERS.]

IN RE THE SWITCHBACK RAILWAY COMPANY.

Companies Act 1890 (*No.* 1074), *sec.* 154—*Rules—Winding up—Payment through Court to liquidator of moneys due to different shareholders by one cheque.*

A judge has no jurisdiction to authorise his associate to countersign one cheque by which there would be paid to the liquidator of a company the whole of a sum due to different shareholders of the company in respect of a dividend which it is proposed to pay them.

THIS was an application made by the liquidator of the Switchback Railway Company that His Honor would authorise his associate to countersign one cheque by which there would be paid to the liquidator the whole of the sum due to the shareholders of the company in respect of a dividend which it is proposed to pay them.

McCutcheon for the applicant in support—The rule requires that a stamp of the value of 2*s.* 6*d.* be affixed to each dividend

cheque. The effect of a strict construction of the rule will be that a 2*s.* 6*d.* stamp may be payable on a dividend of the amount of 2*s.* 4*d.*

Cur. adv. vult.

HODGES, J. In this case an application was made on behalf of the liquidator of the Switchback Railway Company that I should authorise my associate to countersign one cheque by which there would be paid to the liquidator the whole of the sum due to the shareholders of the company in respect of a dividend which it is proposed to pay them. The object of that is to prevent the paying of a 2*s.* 6*d.* stamp on each dividend cheque before it is countersigned by the associate. By sec. 157 of the *Companies Act* 1890, which corresponds with sec. 154 of the old Act, it is provided that—

"The proceedings for winding up a company by the Court, or subject to the supervision of such Court, shall be conducted in the manner and subject to the rules contained in the seventh schedule hereto, or as near thereto as circumstances admit, and the judges of the Supreme Court or the Chief Justice and any two other judges may, as often as circumstances require, annul, modify, or add to the said rules, and may make new rules in lieu thereof or in addition thereto, and may also make rules specifying the amount of fees to be paid in respect of proceedings taken under this part of this Act for winding up a company by the Court."

Rules were made by the judges under the old Act, and by those rules 2*s.* 6*d.* is to be paid, or rather a 2*s.* 6*d.* stamp is to be affixed to every cheque countersigned by the associate. The application in effect is that I should defeat that rule by authorising my associate to countersign a cheque to pay moneys to a person who is not a creditor of the company, and to enable that person to distribute the moneys of the company. The moneys of a company in liquidation have to be distributed by the Court. This is a kind of check which the Court has upon the liquidator. The fee is, so far as I understand, a revenue charge to recoup to some extent the expenses entailed by the keeping open of the courts for the purpose of dealing with the winding up of companies. I think I have only authority to direct the payment of the moneys of the company to the creditors of the company, and I cannot authorise the payment of the moneys of the company to a person who is not a creditor of the company. I think, also, that it would be a very dangerous

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proceeding for an individual judge to nullify a rule made by the judges in consultation, even if I had the power. I think, however, that I have no jurisdiction to disregard this rule, and therefore I feel constrained with some regret, as many of the dividends are very small, in some cases not amounting to the value of the stamp, to refuse the application. I was informed that A'Beckett, J., had granted a similar application, but the learned judge informs me that he has no recollection of having done so. I have also asked several of the other judges, all of whom have informed me that they have never made any such order.

Solicitors for the applicant: *McCutcheon & Bruce.*

A. F. M.

1892

August 25.

Hodges, J.

IN THE WILL OF JOHN MAHONY.

Practice probate—Will on several pages—Execution on first page.

The testator filled up a printed form of will, the printed matter being contained on the first page only, and signed his name at the foot of the first page, at the place prescribed by the printed form; this execution was duly attested. The disposing part of the will on the first page ended in the middle of a sentence, and this sentence was carried on to a second page, and further testamentary dispositions made on the third and fourth pages. There was no signature except upon the first page. Evidence was given by affidavit as to the history of the actual making and writing of the will, showing clearly that the testator treated the whole document as his will before signing.

Held, that probate should be granted to the whole document.

In the Will of White (12 V.L.R. 293) followed.

MOTION for probate of the will of John Mahony.

The will was on a printed form, with the attestation clause printed at the foot of the first page, where the will was duly signed and attested. The disposition made by the will was carried on to three other pages, and the second, third, and fourth pages were not signed or attested. The first page ended in the middle of a sentence; the sentence was carried on and finished on the second page. The clause as to the appointment of executors was printed on the first page, and this was duly filled in. Affidavits were filed showing the testator instructed a friend to write out the will for him, that he then read it all through himself, and said that it was his last will and testament, and then he signed on the first page, and the witnesses duly attested his signature. The deponents

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In re MAHONY.

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alleged that the intention was to sign the document as one whole document, and that the testator and witnesses thought the foot of the first page was the proper place to sign.

Moule for the motion—There is no doubt that the testator treated the will as complete before he signed it. The signature is at the foot of the printed document, although not at the foot or end of the whole document. In the case of *In re White* (*a*), Molesworth, A.C.J., granted probate to a similarly executed document, and decided that he was entitled to resort to verbal evidence as to the history of the making of the will. That decision was based upon the previous case of *In the Will of Holley* (*b*). The more recent decisions of *In re Ryan* (*c*) and *In re Cruikshank* (*d*) are not apparently consistent with the decision of *In re White*, but in the case of *In re Cruikshank* the attesting witnesses never saw the second and third pages.

HODGES, J. I will grant probate upon the authority of the decision in the case of *In re White* (*e*), though for my own part I have strong doubts upon the matter.

Proctors: *Alex. Grant & Son.*

W. H. M.

[IN CHAMBERS.]

1892

August 25, 29.

Hodges, J.

IN RE McCRACKEN, AN INFANT.

Marriage Act 1890 (*No.* 1166), *s.* 40—*Guardian of property of infant—Right of mother to appoint—Procedure where infant is possessed of large property.*

Sec. 40 of the *Marriage Act* 1890, empowering the mother to appoint a guardian of an infant when the father is dead, applies only to a guardian of the person, and not to a guardian of the property of an infant. Where an infant is possessed of property of considerable magnitude, an application to appoint a guardian of the property of the infant should not be made by summary procedure, but in a more formal way, such as by instituting a suit and making the infant a ward of Court.

THIS was an application for the appointment of a co-guardian with the mother of the property of an infant under two years of age. The father died intestate, and the infant was entitled to property of the value of 41,850*l.* The mother obtained administration to the

(*a*) 12 V.L.R. 293.
(*b*) 9 V.L.R. (I.) 52.
(*c*) 14 V.L.R. 706.
(*d*) 14 V.L.R. 897.
(*e*) 12 V.L.R. 293.

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In re McCRACKEN.

Hodges, J.

father's estate, and Alexander McCracken, whom it to appoint co-guardian, was one of her sureties, and the infant.

Goldsmith in support—Sec. 40 of the *Marriage* empowers the mother as guardian to appoint a co-guardia infant's estate is of considerable value, it has been thoug to have the appointment made by the Court.

Cur. a

HODGES, J. In this case an application was made guardian of the property of an infant under two years of entitled to property exceeding in value the sum of 4 does not appear from the materials in support by whom cation is being made—whether it is being made by th the infant, or by his uncle, Alexander McCracken, proposed I should appoint as guardian. The affidavit the infant is under the age of two years, that he is this property, that his mother is the administratrix Crawford McCracken the infant's father, and that has uncles, aunts, and grandmothers, but they do not any notice of this application has been given to thes neither do they state the fitness of the uncle Alexander for the position of guardian. I have been referred to se *Marriage Act* 1890, and to a consent on behalf of to the proposed appointment. In my opinion this secti apply to the appointment of guardians to property, but person of the infant. I am asked here to appoint a gua property, and not to the person of the infant, and th section cannot apply; and as I have no affidavit of the fi uncle, and as no notice has been served upon the other must refuse the application. I may say that where th possessed of property of this magnitude, an applicat appointment of a guardian ought not to be made in th way; the appointment ought, I think, to be made by a proceeding, such as by instituting a suit and making ward of Court.

Solicitors: *Malleson, England & Stewart.*

EY *v.* THE MERCANTILE BANK OF AUSTRALIA (IN LIQUIDATION).

1892
August 28, 22.

Hodges, J.

r—Agent—Following trust moneys—Banking company employed to collect rents—Fiduciary relation.

e defendants, a banking company, also carried on the business of estate agents, such collected money for rents for the plaintiff. The defendants placed the so collected in a separate account in their books, entitled "Agency Account," redited the plaintiff with the amount thereof, and mixed it with their own s. The defendant bank went into liquidation, and the plaintiff brought an to recover the money so collected.

ld, that defendants were in a fiduciary relation to the plaintiff as regards this in receiving it, that the rules as to following trust moneys applied, and ore that the plaintiff was entitled to be paid this money in full in priority to ner creditors of the defendant bank.

parte Dale & Co. (11 C.D. 772) disapproved of.

PECIAL CASE.

his was a case stated by consent for the opinion of the Court ne purpose of determining the rights of a number of creditors e bank. It appeared that in September 1885, James Oddie, prior to that time carried on business as an estate and cial agent under the name of James Oddie & Co., at Ballarat, his business to the defendants for 2,000*l.* The bank continued ing on the business under the name of the old firm, keeping state agency business separate from its general banking busi- and all moneys collected for rents, etc., were paid into a al account called the "Agency Account." The bank went liquidation in March 1892, and there was then a sum of about 0*l.* standing to the credit of this agency account, representing eys collected for owners of various properties. The liquidators ed to pay this money over to the respective claimants on the nd that they could not make any distinction between this unt and any other moneys of the bank. A special case by ent was accordingly stated to try the question whether or not reditors of the "Agency Account" were entitled to be paid in and in priority to the ordinary creditors of the bank.

The present plaintiff claimed for 44*l.* 2*s.* 6*d.*, moneys collected him by the defendants.

Box for the plaintiff.

Mitchell for the defendants.

Cur. adv. vult.

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SHELLEY v. THE MERCANTILE BANK OF AUSTRALIA.

Hodges, J.

HODGES, J. This is a special case stated by consent. The material facts are that the defendants had a branch business at Ballarat, where they carried on the ordinary business of bankers, and also that of estate agents. This last-mentioned business consisted, *inter alia*, in collecting rents as agents for various owners of property. The defendants kept the agency business in books separate and distinct from those containing their ordinary banking transactions, and the moneys collected by the defendants for rents were entered in a book kept by the defendants to the credit of an account entitled the "Agency Account," and the several owners of property in respect of which rent was collected were at the same time credited with the several sums so collected, and the sums so collected appear in this "Agency Account" to the credit of the individual owners for whom they had been respectively received. The defendants have so collected and credited to the plaintiff the sum of 44*l.* 2*s.* 6*d.* The defendant company is now in liquidation, and the matter for determination is as to the right of the plaintiff to be paid this sum in full out of the moneys in the defendant's hands, or as to his being entitled to come in *pari passu* with the rest of the creditors of the defendant company. Summarising these facts, it appears that the defendant company, as the plaintiff's agent, collected 44*l.* 2*s.* 6*d.*, and kept an account of this amount, but it is not alleged that this money was not mixed with their own moneys, and I think that I must take it that it has been so mixed. The defendant company is now being wound up.

In my opinion it is well-settled law that an agent collecting money stands in a fiduciary relation to his principal: *Exparte Dale & Co.* (*a*); *Frith* v. *Cartland* (*b*); and the observations on that case by the late Master of the Rolls in *Hallett's Estate* (*c*); also the language of the same learned judge at p. 709, where he puts in the question, "Has it ever been suggested until very recently that there is any distinction between an express trustee or an agent, or a bailee, or a collector of rents" (which the defendants were) "or anybody else in a fiduciary position?" The defendants therefore in receiving this 44*l.* 2*s.* 6*d.* were in a fiduciary relation to the plaintiff as regards this money. That being so, the modern rules of equity as to following trust money apply: See the question

(*a*) 11 Ch. D. 772. (*b*) 2 H. & M. 417. (*c*) 13 Ch. D., at p. 719.

e referred to, as put by the late Master of the Rolls in *ett's Estate*, and his answer to that question, in the course of h he says :—"The moment you establish the fiduciary relation nodern rules of equity as regards following trust money apply." lso *Frith* v. *Cartland* (*d*). Further, I am of opinion that the ern rules of equity as to following trust money apply, even gh the company is being wound up, for *Frith* v. *Cartland*, e referred to, decided that these rules apply notwithstanding ankruptcy of the trustee, and I do not see in this matter any iple on which a distinction can be drawn between the bank- y of an individual and the winding up of a company. The lusion at which I have arrived is that the modern rules of y as to following trust money apply to this sum of 44*l.* 2*s.* 6*d.* , by the modern rules of equity, if a trustee mixes trust s with his own the whole will be treated as trust property, t so far as he may be able to distinguish what is his own, that such a case the trust property comes first : See *Frith* v. *Cart-* , and *Hallett's Estate*, cited above. Consequently, in the present although the defendants may have mixed up their own ys with the moneys which they held in trust for the plaintiff, rust moneys must be taken out of the fund, and then what ins and only what remains is the defendants'. The plaintiff erefore entitled to be paid the sum of 44*l.* 2*s.* 6*d.* out of the ys in the hands of the liquidators.

This decision is in accordance with what Fry, J., in *Exparte & Co.*, regards as the logical result of *Pennell* v. *Deffell* (*e*). gh it is in conflict with the decision which he felt himself con- ned to give by reason of certain authorities which he has there ined. In the Court of Appeal in *Hallett's Case*, I understand Court there to hold Fry's, J., view of the logical result of *nell* v. *Deffell* to be the law, and that his decision in *Dale & Co.'s* , given in deference to certain authorities, was wrong by reason is having mistaken the effect of those authorities. In my ion *Hallett's Case* shows that the decision in *Exparte & Co.* can no longer be regarded as law, and that being so, I constrained to follow the views of the Court of Appeal, which in direct conflict with the decision in *Dale & Co.'s Case*. I

(*d*) 2 H. & M. 417.

(*e*) 4 D.M. & G. 372.

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SEELEY v. THE MERCANTILE BANK OF AUSTRALIA.

Hodges, J.

will only add that though at first sight it may seem str this creditor should be in a better position than the creditors of the bank, it must be borne in mind that the creditors lent their money to the bank to be used by the b business, and their money, according to their contract bank, might be lent by the bank in carrying on its whereas the bank could not lawfully use the plaintiff's m had only the right to receive it, and hand it over when re the plaintiff. And it is not all unreasonable that the of those who authorised the bank to use their money for to them a sufficient consideration should be postponed to of those who have not so authorised the bank, and who e bank merely to collect their money, and hand it over to shall, therefore, order the liquidators to pay this sum of 4 to the plaintiff, with costs on the Supreme Court scale.

Solicitors for plaintiff: *Cuthbert, Wynne & Co.*
Solicitors for the defendants: *Davies & Campbell.*

1892
August 29.

Hodges, J.

[IN CHAMBERS.]

WILLIAMS *v.* BURDEN.

Practice*—"*Rules of the Supreme Court* 1884"—*Order XII., r.* 30—*r.* 10*—*Setting aside service of writ out of jurisdiction—Whether by summons.

An application to set aside service of a writ out of the jurisdiction sho by way of notice of motion and not by summons.

Order LIV., r. 10*, which provides that the business to be disposed of shall consist of "such other matters as the judge may think fit to d Chambers," applies only to matters as to which no other rule expressly p

APPLICATION by summons on behalf of the defenda aside service of a writ for service out of the jurisdicti Court, and served on him at Adelaide in the colony *Australia.*

Bryant to oppose—There is a preliminary objection. O r. 30, provides that an application to set aside the service

l be by way of motion. As this application has been made by mons it is bad.

Counsel referred to *Hart* v. *Castlemaine Printing Co.* (*a*).

It was contended on behalf of the defendant that Order LIV., *, empowered a judge in Chambers to deal with the application n brought before him on summons. *Main* v. *Duerdin* (*b*) was red to.

HODGES, J. In this case application was made to set aside ce of a writ served out of the jurisdiction of the Court. The cation was made by summons, and the ground was that the e of action arose out of the jurisdiction. It is objected by the tiff that the procedure adopted is incorrect, and that the cation should be made on notice of motion and not by nons. Reliance was placed on Order XII., r. 30. That rule expressly with a party setting aside a writ before he has ed an appearance, and expressly provides the mode of remedy e adopted, and therefore the party cannot select some other o. Reliance has been placed by the defendant upon Order LIV., *, which authorises a judge sitting in Chambers to dispose of matters as he may think fit. But I apprehend that that rule not authorise me to dispose in Chambers of matters which ner rule or enactment expressly provides for, but only applies atters as to which no other rule expressly provides.

olicitor for plaintiff: *Kidston.*

olicitor for defendant: *Crisp, Lewis & Hedderwick.*

A. F. M.

(*a*) 8 A.L.T. 15.

(*b*) 7 A.L.T. 139.

1892
Sept. 13.

Hood, J.

REID *v.* REID.

Husband and wife—Marriage Act 1890 (*No.* 1166), *s.* 104—*Divorce Rules* 1885, *r.* 46—*Application for jury.*

In an application that issues of fact in a suit for judicial separation be tried by a jury, it lies on the applicant to show that the case is a proper one to be so tried.

APPLICATION on behalf of the wife (petitioner in a suit for judicial separation on the ground of cruelty) that the issues be settled by the Court, and be tried before a judge sitting with a jury.

Barrett in support—The application is made under rule 46 of the "*Divorce Rules* 1885." It lies on the respondent to show why the suit should not be tried before a jury.

Topp—Sec. 104 of the *Marriage Act* 1890 gives a discretionary power to the judge as to whether he will order a jury or not. It is obligatory on the party who applies for a jury to show that the matter is one proper to be tried by a jury. It is most unusual for a suit of this particular nature to be tried by a jury.

HOOD, J. Sec. 104 of the *Marriage Act* 1890 provides that it shall not be obligatory on the Court to direct that the truth of the facts shall be determined by the verdict of a jury, so that the granting or refusing such an application is merely discretionary, and therefore I think it lies on the applicant to show that the case is a proper one to be tried by a jury. From the materials before me I am unable to determine whether this is such a case or not. If I granted this application I think it would be impossible to refuse any subsequent one. I refuse the application.

Proctor for petitioner: *H. S. Barrett.*
Proctors for respondent: *Malleson, England & Stewart.*

A. F. M.

[IN CHAMBERS.]

1892
Sept. 15, 30.

Hood, J.

LYONS AND ANOTHER v. GRAHAM; MURPHY, CLAIMANT.

Instruments Act 1890 (*No.* 1103), *s.* 134, 135—*Bill of sale—Notice of intention to file bill of sale—Particulars of property described in bill of sale varying from those in notice of intention to file.*

A notice of intention to file a bill of sale described the property secured thereby as consisting of goods, chattels, etc., at present on certain premises. The bill of sale itself also included in the property secured thereby not only the goods, etc., on the premises at the time of making the bill of sale, but also property which might be afterwards acquired.

Held, that as there was a substantial variance between the notice and the bill of sale, the registration of the bill was bad, and a claim made under it must be barred.

SHERIFF'S INTERPLEADER.

Anderson for the claimant—The claimant relies on a bill of sale dated 11th May 1892, given by the judgment debtor to the claimant over goods seized in execution.

Irvine for the execution creditor—The bill of sale is given over all the goods and chattels in the house at the date of the bill of sale, and also over all other goods and chattels which were then or might be on the premises at any subsequent time. The notice of intention to file the bill of sale described the goods and chattels as follows:—"All the household furniture, stock-in-trade, and effects being in and upon the Philadelphia Hotel, situate in Bay Street, Port Melbourne; also the lease and license of the said hotel." This notice of intention to file is bad, inasmuch as it does not include after-acquired property, although the bill of sale itself does include such property.

Counsel cited *Vaughan* v. *Wildon* (*a*).

Anderson in reply—The form given in the fifth schedule requires that a description of the property included in the bill of sale should be given in the notice of intention to file. The Legislature could never have meant that a description should have been given of after-acquired property, as such property at the time of the execution of the bill of sale is non-existent.

Cur. adv. vult.

(*a*) 12 A.L.T. 17.

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LYONS v. GRAHAM.

Hood, J.

HOOD, J. This was an interpleader arising out of a certain goods under an execution, and the decision of involves the determination of the question of the validit wise of a bill of sale given by the judgment debtor to th Before a bill of sale can be registered, a notice of i file the same must be filed, and must contain the par out in the form in the fifth schedule of the *Instrument* It is obvious that the intention of the Legislature wa description of the property comprised in the bill of sal truly given in the notice. Although a bill of sale may *de facto* registered, yet if it is afterwards found that the of the property in the notice is not true, then the regi the bill of sale ought to stand for nothing. In this c of sale was registered, but it was contended that the irregular, and that therefore the bill of sale is void. T whether the notice of intention to file complies with t ments of the form given in the fifth schedule. Thi requires that the notice should contain a descripti property comprised in the bill of sale, and should sta is situated. It was urged that the Legislature coul intended that the notice should give a description of aft property, as that property must be necessarily non-exis time of filing, but I think that the intention was tha should be stated to enable a creditor to see substan property the debtor intended to part with or mortgag enable him to determine whether he would oppose the of the document or not, and after-acquired property events, be mentioned in the words of the bill of sale, eve be difficult to describe it. On looking at the bill of case, I find that after dealing with the chattels at the premises it proceeds to give a security over other household furniture, stock-in-trade, goods, chatt and effects whatsoever which are now or which may to time or at any other time during the continuance of t be in, upon, or about the said hotel." This is a state parties to the bill of sale of the subject matter comp As the bill of sale includes after acquired property, more property than the notice of intention to file, which

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his property, and therefore I think there is a substantial variation veen the notice of intention and the bill itself. I hold, there- , that the registration of the bill of sale is bad, and the claim e under it must be barred.

Solicitors for sheriff: *Fink, Best & Phillips.*
Solicitors for claimant: *Emerson & Pearcey.*
Solicitors for execution creditor: *Malleson, England & Stewart.*

A. F. M.

[IN CHAMBERS.]

1892
Sept. 20, 21.

BETHUNE *v.* PORTEOUS.

Hood, J.

rity for costs—Appeal—Practice—"Rules of the Supreme Court 1884"—*Order LVIII., r.* 15.

Where an appellant resides out of Victoria, and has no assets in Victoria, and does rove that he has assets in his own country, he may be ordered to give security he costs of the appeal, notwithstanding the fact that a judgment obtained in ria may be transferred to the country of the appellant's residence, and may be ced there.

THIS was an application on behalf of the plaintiff under er LVIII., r. 15, of the *Rules of the Supreme Court* for security costs of an appeal to the Full Court. The defendant resided in Zealand, and judgment having been entered against him in ction brought against him by the plaintiff, he gave notice of eal. It appeared that the defendant had no property in Victoria, no affidavit was filed as to his having property in New Zealand. arguments sufficiently appear from the judgment.

Kilpatrick for the plaintiff in support of the application.

Box for the defendant to oppose.

Cur. adv. vult.

HOOD, J. This was an application under Order LVIII., r. 15, security for the costs occasioned by an appeal, and was made to as an emergency matter. The defendant is the appellant, and ground of this application is that he is a resident in New

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Zealand, having no assets in this colony. The rule provides for the ordering of security "under special circumstances," and the fact that an appellant is a resident in another country makes a *prima facie* case for requiring him to give security: *Re Apollinaris Co.* (*a*); *Grant* v. *The Banque Franco Egyptienne* (*b*). It was, however, contended that this *prima facie* case was rebutted by the fact that judgments of this colony may be enforced in New Zealand (*c*), and reliance was placed upon the decision in *Martin* v. *McDonough* (*d*). In that case it was held that a plaintiff resident in New South Wales need not give security for costs of an action, as by the law in force in that colony a judgment of any other colony may be enforced there, and therefore the defendant would be enabled to obtain his costs by that means if the plaintiff should be unsuccessful. The rule requiring security from a plaintiff being a foreigner resident abroad, is based on the ground that if a verdict be given against him, he is not within the reach of our law so as to have process served upon him for the costs: *Raeburn* v. *Andrews* (*e*). But that does not appear to me to be the foundation of the rule requiring costs from an appellant, because it is clear that he may be ordered to give security even when within the reach of our process. In my opinion the reason underlying the numerous and varying cases in which appellants have been ordered to give security will be found in the injustice to a successful litigant that may be caused if he be compelled to contest the matter for a second time without a probability of obtaining his costs if ultimately successful. No general rule can be laid down, as each case has to depend upon its own "special circumstances," but the foregoing principle has been frequently recognised as applying to appeals. The respondent has obtained a judgment and has acquired what has been called a vested right; having fought his opponent once and defeated him, he ought not to be further vexed by being dragged from court to court to again litigate the same matter with an adversary who cannot compensate him for the extra costs incurred by so doing. Applying this rule to the present case I think I ought to make an order. The

(*a*) 1892, 1 Ch. 1.
(*b*) 2 C.P.D. 430.
(*c*) 2 Badger's N.Z. Statutes, 1176, s. 27.
(*d*) 2 V.L.R. (L.) 37.
(*e*) L.R. 9, Q.B. 118.

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llant has no assets in Victoria, and though the judgment may ransferred to New Zealand, it is not stated that he has any erty there, a matter peculiarly within his own knowledge, and as not yet paid the costs of the trial. I think 30*l.* will be a onable sum to fix, and I order that the appellant give security hat amount for the costs of and occasioned by his appeal n, and that in the meantime, and until such security be given, aid appeal be stayed, and that the costs of this application the result of the appeal.

wish to add that as the decision appealed from here was one y own, I would not have heard this application except at the est of both parties, and as a matter of emergency. I do not der that an application such as this is falls within sec. 36 of *Supreme Court Act*, but still I would prefer not to deal with it, certainly would not have done so if any objection had been n.

olicitors for plaintiff: *Lynch, McDonald, Stillman & Keep.*
olicitor for the defendant: *Hopkins.*

W. H. M.

[IN CHAMBERS.]

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Sept. 22.

Hood, J.

THE COMMERCIAL BANK *v.* CULLEY.

risonment of Fraudulent Debtors Act 1890 (*No.* 1100), *s.* 5, *sub-s. IV.* (*c*).

b-sec. iv. (c) of sec. 5 of the above Act applies to transfers made with intent raud a particular creditor, and to transfers voluntary as well as for consideration. *cNally* v. *Jack* (11 V.L.R. 740) explained.

APPLICATION on behalf of the execution creditor under the *risonment of Fraudulent Debtors Act* 1890, sec. 5, sub-sec. iv. (c), he commitment of the defendant, the judgment debtor. It ared from the evidence that the judgment debtor having notice ne execution had, under pressure, transferred all his unencum- d property to his creditors, other than the execution creditor.

Coldham in support—As the judgment debtor, knowing of the ution, has disposed of all his available property, he has brought self within the sub-section: *Hasker* v. *Moorhead* (*a*).

(*a*) 2 V.L.R. (L.) 160, at p. 168.

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THE COMMERCIAL BANK v. CULLEY.

Hood, J.

Bryant to oppose—An intention to defeat one creditor is no offence under the Act: *McNally* v. *Jack* (*b*). This sub-section only applies to voluntary transfers.

HOOD, J. There have been two questions of law raised in this case. The first objection raised for the defendant is that the case of *McNally* v. *Jack* decides that an intention to defeat one creditor is not an offence within the Act. I do not think that case does so decide, or that the Act will bear such an interpretation. The words of the sub-section are very wide. It provides that: "If it shall appear to the satisfaction of such judge that such person . . . . . shall have made or caused to be made any gift, delivery, or transfer of any property . . . . . with intent to defraud his creditors or any of them, it shall be lawful for such judge if he shall think fit to make an order, etc." These words include the case of a transfer made to a particular creditor. The case quoted decides only that a man is not to be made a criminal simply because the result of a transfer is to defeat a particular creditor, but there must be an actual intention to defraud. There the learned judge refused to find that the debtor had such an intention. The second objection taken is, that the sub-section covers only the case of voluntary transfers, and that as these transfers were not voluntary, they do not fall within it. I do not think the operation of this sub-section is confined to voluntary transfers. If there is the intent to defraud, the fact that there was notice given will not, in my opinion, exempt the debtor from the operation of this Act. I find that the judgment debtor did commit the offence charged, but under the circumstances of this particular case, I will adjourn the matter for a month to enable the parties to come to some settlement.

Solicitors for execution creditor: *Malleson, England & Stewart.*
Solicitor for judgment debtor: *Talbot.*

A. F. M.

(*b*) 11 V.L.R. 740.

R. v. TAYLOR AND CLARKE.

F.C.

1892
August 31.
Sept. 26.

lence—Cross-examination as to credit—Oaths and Evidence Act 1890 (*No.* 1181), *ss.* 9, 12.

The defendants were tried and convicted of conspiracy. During the trial counsel he prisoner desired to cross-examine a witness for the prosecution as to credit by tions put to show that the witness had prepared the case for the prosecution the Crown), or had prepared a statement in anticipation of cross-examination. earned presiding judge held that apart from the *Oaths and Evidence Act*, sec. 9 (*a*), ould have prevented this cross-examination, but held that under the provisions at Act he was compelled to do so.

Held, upon special case stated, that the refusal to allow the questions to be put oss-examination was not justified by the *Oaths and Evidence Act* 1890, but that learned judge had not exceeded his discretionary power in disallowing this -examination.

SPECIAL CASE reserved by Hood, J., for the opinion of the l Court. The following is the special case :—

The prisoners were tried and convicted before me of conspiracy defraud the Land Credit Bank of which Taylor was manager. rke had been a customer of the bank and had been allowed a e overdraft, and the case for the Crown was that this overdraft allowed by Taylor and obtained by Clarke fraudulently. There no dispute as to the fact of the overdraft, nor was the correct- s of the figures questioned, but the case turned upon the charge raud. To prove the existence of this overdraft the Crown secutor tendered in evidence the bank ledgers containing rke's account, they being the ordinary books of the bank. ection was taken to the admission of these entries on the ground t they were not evidence against either prisoner. It appeared vidence *aliunde* that this overdraft of Clarke's was a very large , and had been the subject of discussion between Taylor and the

(a) "If any question put to a witness in cross-examination relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, it shall be the duty of the Court to decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion the Court shall have regard to the following consideration . . . . .

(b) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree only, the opinion of the Court as to the credibility of the witness on the matter to which he testifies."

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directors, and that Taylor had written numerous letters to Clarke in reference to it. The officers of the bank were seven in number, including Taylor, and it was sworn that he used to refer to special accounts in their ledgers, and that the ledger-keepers would not open debit accounts without the authority of the manager. It was also proved that, after the suspension of the bank, Taylor examined Clarke's account in these books with one of the liquidators, and that his only remark was that "it was bad." In other books of the bank were entries in Taylor's writing relating to this account. I admitted the evidence against Taylor as showing the state of Clarke's account.

Certain other of the bank books, called weekly balance books of individual accounts, were also tendered and admitted subject to objection. They contained a list of the balance of the customers' accounts made up weekly by one of the clerks and handed to Taylor or left for him in his office, and by him laid before his directors, and they were supposed to contain correct copies from the ledgers of Clarke's account. When laid before the directors it appeared that Taylor and they had discussions about Clarke's account.

A witness, William Simpson, an accountant, was examined, and I refused to allow him to be cross-examined as to credit, to show that he had prepared the case for the Crown, or had prepared a statement in anticipation of cross-examination. I did not consider that his credit was involved, his evidence being merely an explanation of the books, with the statement that the entries were unusual, all of which had been given before by the witnesses McGann and Hills without question, and there being no real dispute about the matter. I would have prevented the cross-examination apart from the *Oaths and Evidence Act* 1890, but in the face of that Act I considered that I was compelled to do so, the imputation relating to matters of such a character that the truth of it would not, in my opinion, affect the credibility of the witness on the matter to which he testified.

I sentenced the prisoners, but, at the request of their counsel, reserved for the consideration and determination of the judges of the Supreme Court the questions :—

(1) Was I correct in admitting these entries in these ledgers and weekly balance books?

(2) Was I correct in refusing to allow the cross-examination of the witness, Simpson?

Walsh, Q.C., for the Crown.

Madden, Deakin, and Power for the prisoner Taylor.

Coldham for the prisoner Clarke.

Cur. adv. vult.

HOLROYD, J., delivered the judgment of the Court [HOLROYD, A'BECKETT and HOOD, JJ.]. The first question submitted for the determination of the Court was whether the judge before whom the prisoners were tried and convicted was correct in admitting in evidence certain entries in the ledgers and weekly balance-books of the bank which related to Clarke's account. These entries were admitted against Taylor only. The balance-books were supposed to show the balances standing from week to week to the credit or debit of the various customers of the bank, and were laid by Taylor as manager before the directors. We expressed our opinion during the argument of the case, which we now see no reason to alter, that the entries in the balance-books were admissible in proof of the representations made by Taylor to the directors as to the state of Clarke's account. It appears to us that the entries in the bank ledgers were also properly received. When they were tendered, the existence of Clarke's overdraft, and that it was a large and from the beginning a constantly increasing one, had already been clearly established. That it had been a frequent subject of discussion between Taylor and the directors had been proved, and a quantity of correspondence between Clarke and Taylor with reference to it had been put in. There was ample evidence before the jury from which they might infer, not only that Taylor had access to the ledgers, but also that he had studied and was fully cognisant of the entries as to this account of Clarke's, and had himself directed sundry manipulations of the account which the ledgers disclosed. It was most material to lay before the jury the sources of information which Taylor possessed relative to the state of Clarke's account during the course of their correspondence and of Taylor's discussions with the directors. What could be more apposite to the proof of fraudulent intention on Taylor's part than a clear picture of the

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difference between his representations to his directors on the one hand and on the other the figures from which he ought to have drawn, and pretended to have drawn, the very identical statements?

As to the second point raised by the case, we think that the questions proposed to be asked in cross-examination were not intended to affect the credit of the witness by injuring his character within the meaning of sec. 9 of the *Oaths and Evidence Act* 1890; nor do they appear to have been asked solely for the purpose of annoyance within the meaning of sec. 12 of that Act. We are therefore of opinion that the refusal to allow the questions to be put was not justified by the *Oaths and Evidence Act*. The judge stated that he should have disallowed the questions without reference to that Act, and we have to consider whether he could so disallow them. It is generally acknowledged that the presiding judge has some discretion as to the questions which may be asked in cross-examination, though the limits of that discretion may not be clearly defined by decided cases.

"In each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice": *Per* Abbott, C.J., in *Bastin* v. *Carew* (*b*). "No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interfere to protect the witness from unnecessary and unbecoming annoyance. Questions respecting alleged improprieties of conduct which form no real ground for assuming that a witness who could be guilty of them would not be a man of veracity might very fairly be checked": *Taylor on Evidence* (8th ed.), p. 1250. "The judge has a right on all occasions to exercise the power of stopping examinations which are not necessary for any legitimate purpose": *Stephen's History of Criminal Law*, Vol. I., p. 486.

On the facts stated in the case before us the questions proposed to be asked were intended to show that the witness was a partisan, and having regard to the absence of any real dispute as to the facts to which the witness deposed, we cannot hold that in refusing to permit these questions to be put the judge exceeded his powers. The real object of calling the witness Simpson was for convenience, for the purpose of pointing out certain scattered entries in the books with which he was familiar. The section under which this case is stated empowers us to deal with matters of law only; we are not called upon to decide whether or not we approve of the manner in which a lawful discretion has been exercised. Even if

(*b*) Ry. & M. 127.

we thought that the judge ought not to have forbidden the questions, we have, under sec. 482 of the *Crimes Act* 1890, to make "such order as justice may require," and we ought not to order a new trial for an immaterial error. The case of *The Queen* v. *Gibson* (*c*) decides that where evidence not legally admissible to prove the guilt of the accused has been sent to the jury, a new trial should be ordered, although unobjectionable evidence to the same effect as that which ought to have been excluded was before the jury. Here no evidence legally inadmissible was sent to the jury. The objection is that evidence given by one witness was not disparaged by extracting admissions of his partiality. It was not suggested that the questions excluded would have shown him to be corrupt, or that he had stated that which was untrue. Their intended effect was only to lessen the weight which might be attached to his evidence. As the case states that all the evidence which he gave had been given before by two other witnesses without question, we should not feel bound to direct a new trial even if the questions had been wrongly excluded. In answer to the first question asked by the special case, we say, yes; and to the second, that the refusal to allow the cross-examination of the witness Simpson was not illegal. The convictions are affirmed.

Solicitor for the Crown: *Guinness*, Crown Solicitor.
Solicitor for prisoner Taylor: *Hopkins*.
Solicitor for prisoner Clarke: *C. M. Watson*.

A. F. M.

(*c*) L.R. 18 Q.B. 537.

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1892
March 1.
Feb. 18.
March 22.
May 2.
June 8, 9.

IN THE WILL OF JOHN TOWT, DECEASED.

IN THE WILL OF CHRISTINA STURROCK, DECEASED.

Practice probate—Order nisi—Trial by jury—Application for

Sec. 23 of the *Administration and Probate Act* 1890 (No. 1060), pro "if any question of fact shall arise in any proceeding under this Part of t Court may, if it shall think fit, cause the same to be tried by a jury," co Court a power which may be exercised at its absolute exclusive discretio no right either expressly or impliedly to any or all of the parties to clai apply for a jury to try questions of fact, but the Court may receive from the parties at any time for a trial by jury, the most convenient time such suggestions being the time when the order *nisi* is returnable.

March 1.

IN THE WILL OF JOHN TOWT, DECEASED.

ORDER *nisi* calling on the caveatrix to show cause wh should not be granted to the Trustees, Executors, an Company Limited, the nominee of the executors appointe will of John Towt, deceased. At the trial of the order before the case was opened, the caveatrix applied to have tried by a jury.

Purves, Q.C., and *Hayes* for the caveatrix—The desires a jury, as the questions in issue are questions of fa to be determined by a jury.

[A'BECKETT, J. Why was not the application made be

The proper time to make the application is at the trial

[A'BECKETT, J. The facts may be of a class which a have to consider, but the case has been set down for hea judge without a jury, in the ordinary course, and it seem that this application ought to have been made when that applied for.]

It is the ordinary, and it is submitted, the proper under the section, to apply when the case comes on for In an unreported case, *Moss* v. *Sumner*, that was don *Dixson* (*a*); *Re Lamont* (*b*).

Topp and *Weigall* for the applicants, *contra*—When *nisi* was returnable before Hood, J., both sides were rep and no suggestion as to a jury being made, the case w

(*a*) *Supra*, p. 1. (*b*) 7 V.L.R. (I.

ordinary course directed to be set down in the next month's list for trial by a judge without a jury. Sec. 23 of the *Administration and Probate Act* 1890 (No. 1060) only enables the Court to send an issue to a jury if, after hearing the case, it finds itself unable to satisfactorily decide on the facts, and it has always been so interpreted. It gives no right to either side to ask for a jury, but leaves the matter entirely for the judge. In *Moss* v. *Sumner* the circumstances were very special, and the order made was made practically with the consent of both parties. In *Dixson's Case* (*c*), Hood, J., intimated his opinion that neither side was entitled to ask for a jury.

A'BECKETT, J. This is an application to have this matter set down for trial before a jury. It is suggested that this is the proper time to make the application, and the order made *In the Will of Sumner* was referred to as being an authority for the course I am here asked to pursue. On reference to that order it appears to be a very special order, made under the peculiar circumstances of the case, as there were a number of special arrangements between the parties. I cannot regard that case as determining the practice. I have in this case an order in very strict terms directing the case to be set down before a judge without a jury. I therefore think, as a matter of practice, that this is not the right time to make this application, and in the face of this order I think I should proceed to hear and determine this matter. If the parties had consented, or desired, to have this matter tried before a jury, I might have made the order asked for, but under the circumstances I must now go on with the hearing.

Solicitor for the caveatrix: *Hall.*
Solicitors for the executors: *Farmer & Roberts.*

IN THE WILL OF CHRISTINA STURROCK, DECEASED. *Feb.* 18.

IN this case an order *nisi* had been obtained by the caveatrix, Grace Sturrock, calling on the executors of the will of Christina Sturrock, deceased, to show cause why probate should not be

(*c*) *Supra*, p. 1.

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granted to them or in the alternative administration *c.t.a.* should not be granted to her. On the return of the order *nisi* on the 18th February 1892, application was made on behalf of the caveatrix to Hood, J., for a jury, but the application was refused on the ground that that was not the proper time to apply, and the ordinary order putting the case in the list of cases for trial without a jury was made.

March 22.

Subsequently application was made to Holroyd, J., in Chambers, for an order under sec. 23 of the *Administration and Probate Act* 1890 (No. 1160), directing the trial of the questions of fact arising in the matter before a jury.

HOLROYD, J. In my opinion sec. 23 was intended for the assistance of the judge before whom the order *nisi* is heard so as to enable him, if he desires to have the assistance of a jury, to order that the questions of fact should be tried by a jury. I do not think that it was intended that a party to the proceedings should be entitled to make an application for a jury under sec. 23 before the hearing of the order *nisi*.

May 2.

Subsequently the case came on in the list of cases for trial before A'BECKETT, J., without a jury.

McInerney and *Rickarby* appeared for the caveatrix to move the order absolute.

Purves, Q.C., and *Topp* for the executor in support of the will.

Before the case was opened,

McInerney—The case is a fit case to be tried by a jury, and I now apply that the matter should be sent to a jury.

[A'BECKETT, J. This is not the proper time to make the application.]

When the order *nisi* was returnable in the first instance before Hood, J., I applied for a jury, but His Honor refused to grant it.

plication for a jury was then made to Holroyd, J., in Chambers, he refused it on the ground that the proper time for the lication to be made was at the trial, and since then Hood, J., d, in *Re Dixson* (*d*), that the proper time to apply was at the trial.

Purves, Q.C.—We are entirely taken by surprise. We are dy to go on, and have all our witnesses here.

A'BECKETT, J. Very well, I will go on, and I adhere to the w I took in *Re Towt* as to what should be the practice in se matters. The old practice used to be that an order *nisi* obtained as of course, returnable on a certain day. On that the parties used to attend, and, in all probability, nobody w whether it would be then heard or not. It was necessary have the witnesses on both sides in attendance at a time when case probably could not come on. To avoid that, the practice , I think, introduced by myself of providing that when the er *nisi* was returnable, the parties should then decide what was be done, and that all necessary preliminaries to the hearing uld be settled. That would be the proper time to arrange for trial and to make any application for any variance from the inary practice. I think it would introduce a most undesirable fusion and waste of time for witnesses on both sides to be here then for an application to be made which would make their ndance absolutely useless. I think the ordinary order directing case to be heard before a judge without a jury having been de that the case should come on.

[*McInerney* pointed out that when that order was made lication for a jury had been asked for and refused.]

A'BECKETT, J. I cannot look at that. All the parties are here, I think it beneficial to the parties on both sides that the tter should go on.

June 8.

From this refusal to grant a jury the caveatrix appealed to the ll Court [*Coram* HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.].

McInerney and *Rickarby* for the appellant, after referring each of the above decisions—It is apparent from the decisions of

(*d*) *Supra*, p. 1.

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Holroyd, J., A'Beckett, J., and Hood, J., in this case, that in their opinion, one or other of the three times at which application was made for a jury was the correct time for the application to be made, but they differ as to when that should be, and a great injustice has been done in this case by reason of that difference of opinion.

[HOLROYD, J. My view was that there was no correct time, that it was not the right of a party at any time to apply, but that it was a matter entirely for the Court's own discretion and assistance. That is apparent from the first part of my judgment, though I might have added the words "or at any time" to the last part of my judgment. I think Mr. Justice Hood is of the same opinion as myself. I should be disposed to say that if the application could be made at all it would be most convenient to make it before the hearing, but I think the application cannot be made at all. If the judge at the hearing wants a jury he can have one. Neither party has a right to one.

HIGINBOTHAM, C.J. That was the old rule in equity, was it not?

HOLROYD, J. Yes, in *Learmonth* v. *Bailey*, after evidence had been taken for 27 days, the judge sent the case to a jury.]

Topp for the respondent—In *Re Hill* (*e*) a considered judgment given two days ago by A'Beckett, J., he expressly held that neither party could at any time make the application as a matter of right. [He was here stopped by the Court.]

McInerney in reply.

[HOLROYD, J. The judge must do it of his own motion, not on the application of either party.]

(*e*) The following was the judgment of A'Beckett, J., in *Re Hill*:—

"A'BECKETT, J. In this case an order *nisi* was obtained under sec. 19 of the *Administration and Probate Act* 1890. On the return day the caveator asked that the case might be tried by a jury under sec. 23. Some uncertainty has prevailed as to when an application of this kind ought to be made, and I therefore consulted my brother judges on the subject. They agree with my view that the proper time is on the return day when the caveator appears, and when, according to the present practice, a day is fixed for hearing, or the case is directed to be put in some list. In saying that this is the proper time for making the application they do not wish it to be supposed that they recognise any right of the parties to have a case so tried. Even if both sides asked for a jury the Court would not be bound to accede to the application, and, if it were refused, the judge who heard the case might, nevertheless, afterwards direct an issue at his

The judge is given a discretion which must be properly exercised when it is pointed out by either party that the time for its exercise has arisen. A'BECKETT, J., in this case did not exercise his discretion at all, but refused the application on the ground only that it was not made at the right time. The words "the Court" in sec. 23 refer to the hearing. The words "the Court may, if it shall think fit," in the section confer a discretion in the Court which gives rise to a right: *Julius* v. *Bishop of Oxford* (*f*). The judge in this case should have heard arguments as to whether or not his discretion should be exercised.

[HIGINBOTHAM, C.J. Why should the Court be required to hear the views of the parties on a matter on which an absolute discretion is given to the Court itself for its own aid.]

If the judge exercises his discretion by saying that at that time he does not want a jury, there is no cause of complaint, but if he declines, as here, to exercise his discretion, the parties are deprived of their rights. The case I have cited shows that the parties are interested in the exercise by the Court of its discretion, and may call for its exercise.

Cur. adv. vult.

June 9.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. In this case a *caveat* was lodged with the registrar against an application for probate. When the order *nisi* came on to be heard, application was made on behalf of the caveator for the trial of questions of fact by a jury. The learned judge refused the application, observing that, in his opinion, the proper time to arrange for a trial by jury was the day on which the order *nisi* was returnable, when all the preliminaries should be settled. This decision is now appealed from.

own discretion. Sec. 23 was part of an Act which came into force when probate cases were heard by the equity judge, and gave him power to direct an issue for his own satisfaction.

The late Mr. Justice Molesworth, on two or more occasions, after himself hearing evidence, directed an issue under this section on his own motion, but it was never treated as giving the parties a right to supersede the ordinary mode of trial at their own instance. In the case with which I have now to deal the executors object to having the case heard by a jury, and this I think sufficient reason for declining to have one. For the same reason I do not accede to the suggestion of counsel for the caveator that he should be at liberty to support his application by affidavits.

(*f*) 5 App. Cas. 214.

F.C.
1892
In re TOWT.
In re STURROCK.
Higinbotham, C.J.

By sec. 23 of the *Administration and Probate Act* 1890 it is provided that:—

"If any question of fact shall arise in any proceeding under this Part of this Act the Court may, if it shall think fit, cause the same to be tried by a jury before the Court itself, or before any judge of the Court, and the same shall be tried in the same manner as an issue under any rule of Court for the time being in force relating to the trial of issues."

This section is taken from the 34th section of Act No. 427, "*The Administration Act* 1872," which purported to apply, in the Administration and Probate Jurisdiction of the Court, the mode of trial by jury of issues under the "*Equity Practice Statute* 1865." The power given by that section and by the existing section is in conformity with the long established practice of the Supreme Court in its equitable jurisdiction with regard to trials of questions of fact by a jury. Power is given to the Court, for its own information and assistance, to order a trial by jury of questions of fact. This power may be exercised by the Court at its own absolute discretion. No right is expressly or impliedly conferred on any or all of the parties to claim or even to apply for a jury to try questions of fact. The language and the history of this enactment plainly indicate, in our opinion, that the Court possesses the exclusive and unfettered discretion either to determine for itself, or to obtain the findings of a jury upon, questions of fact arising in this branch of the jurisdiction.

The learned judge, therefore, was at liberty to refuse to entertain the application of the caveator in this case. The Court may, of course, receive suggestions from the parties at any time for a trial by jury, and we concur with the learned judge that the most convenient time for offering such suggestions is the day when the order *nisi* is returnable, and when, according to the present practice, a day is fixed for the hearing, or the case is directed to be placed in a list. The Court would not be bound to accept the suggestion if made at that time and by all the parties; and if the suggestion should not then be accepted and an order made, the judge who subsequently hears the case might direct an issue at his own discretion. The appeal will be dismissed with costs.

Solicitors for executors: *Major* for *Armstrong*, Kyneton.

A. J. A.

ER v. THE TRUSTEES, EXECUTORS, AND AGENCY COMPANY LIMITED.

1892
May 27, 30.

Hodges, J.

ct 1890 (*No.* 1159), *s.* 24—*Devise of land—Devise of real estate in a particular place—Leasehold estate in such place.*

tator having freehold land and leasehold land at Coburg devised all his "real Coburg."

, that, there being no contrary intention on the face of the will, such devise he leasehold land as well as the freehold.

IGINATING SUMMONS.

a codicil to his will, bearing date the 19th February 1891, stator Thomas Hester, devised all his real estate in Nott Port Melbourne, in the colony of Victoria, to the use of his Eleanor Frances during her life, and from and after her o the use of his son Arthur Hester, his heirs and assigns er. The codicil then proceeded:—"I devise all my real at Coburg, in the said colony, to the use of my said wife r Frances Hester, during her life, and from and after her to the use of my son Thomas Hester, his heirs and assigns r."

e testator left freehold estate at Coburg, consisting of two ents of land in Franklyn Street of the value of about 62*l.*, also left a leasehold estate consisting of an unexpired term t years of premises situate in Coburg, on which was erected nery and plant required for a flock mill, of the value of about the business in connection with which was, during the r's lifetime, and up to his death, managed and carried on by id son Thomas, and which the testator had informed his son as and other members of his family he intended to leave to

he present summons was taken out by his son Thomas st The Trustees Executors and Agency Company Limited, xecutor of the testator's will, to determine whether the devise the testator's real estate at Coburg carried both the real and easehold estate at Coburg, and whether the same should be ferred to the plaintiff, subject to the life estate therein of the w. When the summons first came on Hodges, J., directed

1892

HESTER v. THE TRUSTEES, EXECUTORS, AND AGENCY CO. LIMITED.

Hodges, J.

that it should be served on Arthur Hester, another son, as representing the class entitled under the will to the residue of the estate.

Agg for the plaintiff—A devise of the "land" of a testator in any place, or any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, is to be construed to include the leasehold estates of the testator, to which such descriptions extend, as well as his freehold estates, unless a contrary intention shall appear by the will: Sec. 24 of the *Wills Act* 1890 (No. 1159). The devise of the testator's "real estate" at Coburg is, it is submitted, in the same position, and carries the leasehold as well as the freehold land at Coburg: 1 *Jarm. on Wills* (4th ed.) 675; *Moase* v. *White* (*a*); *Re Davison* (*b*). There is no contrary intention on the face of the will or codicil, in fact the use of the term "all" goes to show that the testator intended to pass the leasehold estate on which his son had carried on his business, for the freehold land was of exceedingly trifling value. Nothing is to be deduced from the definitions of "personal estate" and "real estate" in sec. 3; first, because the term used in section 24 is "land"; and secondly, because the definitions overlap considerably. "Personal estate" is made to include leasehold estates and other chattels real, certain other matters mentioned, "and all other property whatsoever, which by law devolves upon the executor or administrator," which would, of course, now carry all freehold lands; and "real estate" includes lands and hereditaments (whether freehold or of any other tenure, and whether corporeal, incorporeal or personal), and any estate, right or interest (other than a chattel interest) therein. The term "real estate" is used in the Act in secs. 25, 26, and 28 among other sections.

Morrison for the defendant company.

Hayball for Arthur Hester, as representing those entitled to the residue—A devise of a testator's "real estate" at a particular place does not carry a leasehold estate where the testator has

(*a*) 3 Ch. D. 763. (*b*) W. N. 1888, p. 41.

freehold estate to answer the description: *Wilson* v. *Eden* (*c*), *per* Lord Langdale; *Butler* v. *Butler* (*d*), *per* Chitty, J.

Agg in reply—In *Wilson* v. *Eden* Lord Langdale arrived at his conclusion on the particular words of the will "*other* real estates," the word "other" having reference to the subjects spoken of before; *i.e*, the real estates there referred to were "*ejusdem generis*" with those previously spoken of. There was a clear contrary intention on the face of the will.

[HODGES, J. Though that is the reasoning of the Master of the Rolls, his view seems to have gone further.]

As pointed out by Chitty, J., in *Butler* v. *Butler*, it is not a decision. In that case the devise was of the testator's "real estates" except a particular *freehold* estate referred to, the use of the term freehold showing that the testator used the term "real estates" as freehold estates, and the case of *Moase* v. *White* was distinguished on the ground that it was a gift in substance of real estate described in reference to locality, which, apparently, Chitty, J., thought would properly carry a leasehold (*e*).

He also cited *Addis* v. *Clement* (*f*); *Lane* v. *Earl Stanhope* (*g*), on the construction of similar words before the *Wills Act*.

Cur. adv. vult.

HODGES, J. The testator, by a codicil to his will, devised all his real estate at Coburg to the use of his wife for life, remainder to the plaintiff. The testator at his death had two allotments of land at Coburg of the value of about 62*l*., and also a leasehold estate at Coburg, on which was erected a flock mill of the value of about 500*l*., and the question he had to determine was whether this leasehold passed with the two allotments of land under the devise of the testator's "real estate at Coburg." Sec. 24 of the *Wills Act* 1890 (No. 1159) provided that "a devise of the land of the testator or of the land of the testator in any place, or in the occupation of any person mentioned in his will or otherwise described in a general manner, and any

(*c*) 11 Beav., pp. 250-2.
(*d*) 28 Ch. D., pp. 73-74.
(*e*) 28 Ch. D., p. 75.
(*f*) 2 P. W. 456.
(*g*) 6 T. R., p. 353.

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HESTER v. THE TRUSTEES, EXECUTORS, AND AGENCY CO. LIMITED.

Hodges, J.

other general devise which would describe a leasehold e
testator had no freehold estate which could be desc
shall be construed to include the leasehold estates of
or of his leasehold estates or any of them to which such
shall extend (as the case may be), as well as freehold es
a contrary intention shall appear by the will." Upon
corresponding to that in England, it had been decided
of *Moase* v. *White* (*i*) that a gift of "real estate" in
place was similar in effect to a gift of "land" in tha
carried leasehold estates where there was no contra
apparent from the will. That case was precisely sim
present case. It was discussed in the case of *Butler* v
and not dissented from. He should follow that case
answer the question in the affirmative, that the devis
testator's real estate at Coburg carried both the r
leasehold estate at Coburg. Costs of all parties to be
the estate, those of the executors as between solicitor a

Solicitors for plaintiff: *Wisewould, Gibbs & Wisew*
Solicitor for defendants: *Plummer.*

1892
April 28.
May 3.

Williams, J.

IN RE THE WILLS AND CODICILS OF MARY CRAWFORD, I

Practice probate—Will and codicils—Will revoking previous wi codicil to prior will—Reviving of prior will.

A testatrix having made a will dated 10th January 1890, and codicil thereto, made another will revoking all other wills made by h she executed a codicil making certain dispositions of her property, an to the second will in any way, but specially referring to the will of 10t and calling it a second codicil thereto.

Held, that the second codicil amounted to a confirmation of the revocation of the second.

MOTION for probate of the will of Mary Crawfo dated 10th January 1890, and marked A, and two codi dated 5th September 1890, and 16th August 1891, and marked B and C.

(*i*) 3 Ch. D. 763. (*k*) 28 Ch.

1892

In re CRAWFORD.

Williams, J.

The deceased had also executed another will on the 26th Septem-1890, marked D, by which she provided as follows:—"I hereby ke and cancel all other wills made by me," and made other ositions of her property.

The codicil of 16th August 1891 was entitled a "codicil to the will and testament" of the testatrix. It made no reference ever to the second will of 26th September 1890, but provided llows:—"I, Mary Crawford, having made my last will and ment on the 10th day of January 1890, do hereby make this econd codicil to the same," and went on to make certain ositions of her property.

These documents were all produced and bore no marks of llation or destruction.

Evans moved for probate either of the first will, marked A, wo codicils B and C, or of the will marked D.

Cur. adv. vult.

WILLIAMS, J. On the 10th January 1890 the deceased duly uted the will marked A. On the 5th day of September 1890 duly executed the codicil to that will marked B. On the day of September 1890 she duly executed the will marked D. he 16th day of August 1891 she duly executed the codicil ed C, and three days after executing this codicil she died. now asked to grant probate of either will A or will D, and uestion for me to consider is of which of these two wills ought allow probate.

n *Jarman on Wills* (4th ed.), Vol. 1, p. 188, it is stated metimes a codicil has the effect of impliedly revoking the erior of two wills by expressly referring to and recognising the one as the actual and subsisting will of the testator," and at 189 of the same work *Lord Walpole* v. *Earl of Orford* (*a*) *Crosbie* v. *Macdonal* (*b*) are cited for the propositions: That if a testator makes two wills, the one earlier in point of than the other, and he afterwards makes a codicil which he

(*a*) 3 Ves. 402. (*b*) 4 Ves. 610.

1892

In re CRAWFORD.

Williams, J.

declares to be a codicil to the earlier will, this would set up the earlier in opposition to the posterior will; and (2) that parol evidence is inadmissible to show that the testator actually intended to refer to the later will.

Sec. 20 of the *Wills Act* 1890 does not appear to have affected the law upon this point, and the doctrine laid down in *Lord Orford's Case* still holds good: See *Jarman*, at p. 191.

Applying the doctrine I have stated to the present case, I am of opinion that the testatrix in codicil C has given unmistakeable evidence of her intention to revoke the will D and to recognise the will A as her actual and subsisting will, if she were of sound testamentary capacity at the time of executing codicil C. Upon this most important point the evidence before me is not satisfactory. The only evidence I have upon the point is that of one of the attesting witnesses, Andrew O'Neill. The other attesting witness, John Cole, makes no affidavit. Before granting probate of will A and its codicils B and C, I desire to have his evidence upon the mental state of the testatrix at the time of the execution of C, and also the evidence of Edmund Moloney, the brother of the testatrix, who is one of the executors appointed by A, who takes no interest under that will, and at whose house the testatrix was staying when she executed the codicil C, and any further disinterested evidence that may be procurable. When this further evidence is furnished to me I shall be disposed to favourably entertain the application for probate of the will A and its codicils B and C.

Subsequently the Court being satisfied as to the testamentary capacity of the testatrix granted probate of the will A and its codicils B and C.

Solicitors: *Evans & Masters.*

A. J. A.

THE OSBORNE PARK LAND AND INVESTMENT COMPANY LIMITED *v.* PEGG.

1892
June 6.

Hood, J.

"The Companies Statute 1864" (*No.* 190)—*Limited company—Agreement to form company—Delegation to solicitor of general power to frame memorandum and articles—Memorandum with greater powers than those agreed—Allotment of scrip—Duty of shareholder—Calls—Delay in repudiation of shares.*

Certain persons, including the defendant, who had formed a syndicate to purchase and had purchased a particular piece of land, met together and agreed to form a limited company to take over the land, certain scrip in the company to be allotted to each member of the syndicate. At such meeting the question of drawing up the memorandum and articles of association was discussed, and it was agreed that it should be left to the solicitor of the syndicate to draw them up and register the company. The solicitor accordingly did so, and included in the objects for which the company was formed, power to purchase land in any of the Australasian colonies, and other powers not necessary for a land company. Immediately after the registration scrip for the defendant's proportion of shares was sent to him. He did not know of the provisions of the memorandum of association or articles, or make any inquiries as to them for over three years, during which the company went on dealing with strangers. Meanwhile instalments on his shares became due, which he did not pay. When the company, becoming a failure, eventually pressed him for payment, he refused to pay on the ground that the company registered was not the company he had agreed to join, which was a company to purchase this particular piece of land only. On action brought by the company for such instalments,

Held, that the solicitor was the agent of the defendant, among others, to draw up the memorandum and articles of association, that it was the defendant's duty to see, within a reasonable time, that the agent had not exceeded his authority, and that he had allowed an unreasonable time to go by without objection, and was therefore liable.

ACTION to recover subscription money on certain shares in a limited liability company.

Twenty persons, including the defendant, formed themselves into a syndicate to purchase, and did in fact purchase, certain land. Subsequently, namely, on the 3rd September 1888, they held a meeting at which they agreed that a company should be formed consisting of 25,000 shares of 1*l.* each, to take over the property from the syndicate, certain scrip in the company to be allotted to each member of the syndicate. Mr. Jennings, the syndicate's solicitor, was present at the meeting.

The question of the drawing up of the memorandum and articles of association was mentioned at the meeting and it was agreed that it should be left to their solicitor, Mr. Jennings, to draw up the memorandum and articles of association, making them

1892

THE OSBORNE PARK LAND AND INVESTMENT CO. LIMITED v. PEGG.

Hood, J.

as wide as he thought fit, and to register the company. The memorandum and articles were accordingly drawn up and the company registered under the name of "The Osborne Park Land and Investment Company Limited." The defendant's proportion of scrip was almost immediately sent to him, and stated on its face that it was subject to the memorandum and articles of association, but he did not make any inquiries as to the memorandum or articles for over three years, nor did he pay any of the instalments which became due on his shares during that time. When the company, becoming a failure, eventually pressed him for payment of the instalments, he refused to pay on the ground that he had never agreed to become a member in a company such as the company registered, but only in a land company formed to purchase this particular piece of land, whereas the company formed had much wider powers.

The memorandum of association of the registered company stated the objects for which the company was formed as follows:—

"1. To purchase acquire take in exchange and hold freehold or leasehold land as may be deemed expedient from time to time.

"2. To sell and mortgage freehold and leasehold estate.

"3. To take on lease or otherwise and let on lease or otherwise any freehold or leasehold estate and to grant and accept easements and licenses as to the same.

"4. To erect build alter repair and maintain houses and buildings of any nature quality or description whatever.

"5. To borrow money and to receive money on loan or deposit or otherwise with power to give mortgages over any property of the company or the uncalled capital or any part thereof to give or issue bonds debentures bills of exchange promissory notes or other obligations or security for any money received and for interest thereon and generally to raise money in such manner as the company shall think fit.

"6. To make draw accept endorse and give bills of exchange or promissory notes.

"7. To make loans or advances upon freehold or leasehold securities and to accept and take such securities and assurances therefor as may be considered necessary or advisable and to negotiate loans of all descriptions upon any terms as to profit or remuneration.

"8. To give any guarantee or other security of the company that may be required or agreed upon for the performance of any business undertaken by the company or for the due payment of any money invested by the company.

"9. To carry on all or any of the businesses usually carried on by land companies in all their several branches and in particular to lay out and improve alter and develop by draining clearing filling up road-making subdivision or otherwise any property of the company and thereon to erect and construct or assist in the erection or construction of any buildings or works whatsoever and to pull down alter and rebuild any existing fixtures erections or buildings required by the company.

"10. To buy out sell to or amalgamate with any other company or companies.

"11. To discount and to guarantee bills of exchange and promissory notes and all other negotiable securities.

"12. To do all or any of the above-mentioned things in any part of the Australasian colonies where the same may lawfully be done respectively and either singly or in connection with any other corporations or companies firms or persons.

"13. To do all such other things as may be incidental or conducive to the attainment of the above objects."

The present action was brought by the company for the instalments due on the shares.

Mitchell for the plaintiff—Though the memorandum of association drawn up was much wider than was necessary for a land company, the defendant suffered no injury therefrom, as the company never acted except as a land company. The defendant took his scrip and kept them without demur for three years until the company turned out a failure. It is submitted that it is now too late for him to repudiate his liability as a shareholder.

Topp for the defendant—The defendant only agreed to certain things being put in the memorandum and articles, namely, what was usual in the case of a land company.

[HOOD, J. Was not Mr. Jennings the agent of the defendant, among others, to prepare the memorandum and articles ?]

Yes, but only to put into them what the syndicate had agreed to.

[HOOD, J. Was not it your duty to see that your instructions were properly carried out and were not exceeded ?]

It is submitted that where it is left to certain persons to procure the registration of a company for certain objects, and it is registered for other objects, the principal is not bound: *Lindley on Companies* (5th ed.), 24-6, where all the cases are collected, including *Stewart's Case* (*a*) and *Webster's Case* (*b*).

Mitchell in reply—Persons receiving scrip as the defendant did are bound to see that their instructions as to the formation of the company have been complied with: *Lawrence's Case* and *Kincaid's Case* (*c*); *Peel's Case* (*d*), *per* Lord Cairns; *Oaks* v. *Turquand* (*e*). In this case, too, the scrip is, on its face, made

(*a*) L.R. 1 Ch. 574.
(*b*) L.R. 2 Eq. 741.
(*c*) L.R. 2 Ch. 412.
(*d*) L.R. 2 Ch., p. 684.
(*e*) L.R. 2 E. & I. App. 325.

1892

THE OSBORNE PARK LAND AND INVESTMENT CO. LIMITED v. PEGG.

Hood, J.

subject to the memorandum and articles, and the defen
accepting it, should have informed himself what that
not have allowed creditors to deal with the company on
tion that he knew.

HOOD, J. The company here is suing for money
purchase money for certain shares. Some twenty person
a syndicate to buy a particular piece of land, and they
to turn the syndicate into a limited company under the
twenty persons delegated to their solicitor power to
memorandum and articles of association for the compa
did not expressly define what was to be put into t
solicitor in question states that at the meeting he
would be as well that the memorandum and articles sho
as wide as possible. If he did so I find as a fact that th
did not agree to the extension of the memorandum. T
then arises whether the defendant is now bound to pa
in a company the memorandum of which goes further th
agreed to. It seems that scrip was sent to him almost
after the company was registered, and for three years he
whatever. He made no inquiry to find out whether th
as registered, was the company he had agreed to join, b
scrip, and if the company had succeeded would have go
the company might have made. I accept his view that
know what was in the memorandum of association, bu
an unreasonable time before making any inquiries. T
distinguishable from any of the cases cited. Here
persons appointed the solicitor as their agent, to act fo
I should say that there is an obligation on them to
reasonable time if their agent has done his duty prop
allowed a third individuality to arise which went on hav
with strangers, all of which would be void if they are all
that they did not agree to join the company, because
remembered that if the defendant can escape the others
same if they knew no more than he did. There is a du
shareholder to look at the memorandum and articles of
at the earliest practicable moment and satisfy himself t
nothing in them to which he desires to make objection

Cairns in *Peel's Case* (*f*). I think the defendant must fail. Judgment for the plaintiff on the claim for 1,000*l.* and costs. Judgment for the plaintiff on the counterclaim and costs.

1892

THE OSBORNE PARK LAND AND INVESTMENT CO. LIMITED v. PEGG.

Solicitors for the plaintiffs: *Jennings & Jennings.*
Solicitor for the defendant: *J. E. Dixon.*

A. J. A.

IN THE WILL OF EDWARD MAHER, DECEASED.
IN THE WILL OF JOHN LUDWIG, DECEASED.

1892
June 23, 30.

A'Beckett, J.

Practice probate—Will—Misnomer of executor—Latent ambiguity—Evidence of testator's intention.

Where there was no company exactly answering in name to that of a company appointed by a testator to be his executor, extrinsic evidence of the company intended by the testator was received, and probate granted accordingly.

MOTION for probate of the will of Edward Maher, deceased, to the National Trustees Executors and Agency Company of Australasia Limited.

The testator had by his will appointed "The Trustees Executors and Agency Company, Melbourne," to be his executor. Affidavits were filed showing that there was no company of such a name, but that there was a company carrying on business in Melbourne called "The Trustees Executors and Agency Company Limited." They further showed that one John Quinlan took instructions from the testator to draw up the will, and on being asked by the testator to act as executor said it would be best for him to appoint the Trustees Executors and Agency Company in Melbourne as executors; —that there was some other part of the name he could not remember, but that Nicholas Fitzgerald was one of the directors, and he was a son-in-law of Sir John O'Shanassy;—and that the company was incorporated by Act of Parliament. To this the testator assented, and Quinlan then drew up the will and put the name of the company as above. The affidavits also showed that Nicholas Fitzgerald was a director of the applicant company and of no other trustee company. The Trustees Executors and Agency Company Limited being satisfied that they were not intended, filed a renunciation and disclaimer.

(*f*) L.R. 2 Ch., p. 684.

1892

In re MAHER.

In re LUDWIG.

A'Beckett, J.

The consents of the parties interested under the will to the application were filed.

Weigall for the motion—It is clear from the affidavits that the testator intended to appoint the applicant company, and as there is a technical defect in the name of whatever company was actually appointed, it is submitted that extrinsic evidence of the testator's intention may be given: *In the Goods of Brake* (*a*); 1 *Jarm. on Wills* (4th ed.), 432; *Theobald on Wills* (3rd ed.), 198.

Cur. adv. vult.

A'BECKETT, J. I am not guided in my decision by the disclaimer of the Trustees Executors and Agency Company Limited. That only shows that the only person interested in opposing this application consents to it. On the evidence I think it does appear that the company which is now applying was the company that the testator intended to appoint as his executors. On the authorities referred to I think that evidence is admissible to explain the misnomer. I will grant the application.

Motion granted.

Solicitors: *Gavan Duffy & King.*

June 30.

MOTION for probate of the will of John Ludwig, deceased, to the Trustees Executors and Agency Company Limited in the will called "The Melbourne Trustees and Executors Agency Company."

The will was made in 1883, and the affidavits showed that at that time there was only one trust company in Melbourne, namely, the applicant, which was formed shortly before, and there was no means at the time the will was drawn of immediately discovering the correct name.

Meagher in support of the motion.

A'BECKETT, J. I will grant the application.

Solicitor: *Knott*, Warragul.

A. J. A.

(*a*) 6 P.D. 217.

FITZGERALD *v.* THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.

F.C.

1892

June 8.

Orders LIV., r. 24, LVIII., r. 15, and LXIV., r. 7—Originating summons—Order in Chambers—Appeal—Time for appealing—Extension of time.

The time for appealing from an order in Chambers made upon an originating summons is eight days.

Semble, Order LIV., r. 24, governs the time for appealing from any order in Chambers. Order LVIII., r. 15, must not be considered as affecting such appeals.

Where the time for appealing has gone by, the Court will not extend the time under Order LXIV., r. 7, unless it is either furnished with special reasons or grounds for so doing, or arrives at the conclusion that it is either necessary or highly expedient in the interests of justice.

APPEAL from an order made in Chambers on an originating summons.

The originating summons was taken out by Richard Fitzgerald and Henry Vanheems against the Trustees Executors and Agency Company Limited, and the beneficiaries under the will and two codicils of John Fynn, deceased, for an order declaring that according to the proper construction of the trusts of the will and codicils, the management of the estate, and carrying into effect of the trusts thereof, were not now to be handed over to and performed by the defendant company in the terms of the second codicil of the will, and His Honor Mr. Justice Williams, on the 27th April 1892, made an order so declaring.

Notice of appeal by the defendant company was given on the 20th May 1892.

Topp and *A. Campbell* for the plaintiffs.

McInerney for the defendant company.

Shiels for the beneficiaries other than the plaintiffs.

McInerney took a preliminary objection—This is an appeal from an order made in Chambers, and comes under Order LIV., r. 24. Under that order the appeal must be brought within eight days. As it was not, it is submitted that the company has no right to appeal. It has treated the matter as one coming under Order LVIII., r. 15, but even under that order it must be made within fourteen days.

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Topp contra—An originating summons is a civil proceeding commenced otherwise than by writ, in accordance with the Rules of Court, and is therefore an action within the meaning of the term as defined by the *Judicature Act*, sec. 3: *Re Fawsitt* (*a*). The time for appealing from an order made in an action is one month: Order LVIII., r. 15.

[HODGES, J. Every appeal from any decision in Chambers in this colony must be made within eight days, under Order LIV., r. 24.]

The matter clearly comes within the meaning of the term "action" in Order LVIII., r. 15, which it is submitted therefore applies, especially as that rule goes on to refer to appeals from orders in Chambers.

[HODGES, J. It may be an action within the meaning of that rule, but inasmuch as there is a special rule applying to this particular matter it will cut down the general rule. There has been a very serious change made in the adoption of these rules from the English Rules. Under the English Rules, Order LVIII., r. 15, applied to appeals to the Queen's Bench Division from a judge in Chambers, while Order LIV., r. 24, applied to appeals from the Divisional Court to the Court of Appeal.]

The order made in this case is a final order in an action, and even though made in Chambers, it is submitted that there is the same time for appealing from it as from any other final order. It has been generally so treated by the profession, and there have been numerous appeals from orders made on originating summonses, after the expiry of eight days. In this case it must, at some time, be definitely and authoritatively decided for the benefit of everybody interested who are the trustees of the will, and under these circumstances, I should ask Your Honors to extend the time for appealing under Order LXIV., r. 7.

[HODGES, J. Should not we have some materials before us to justify us in disregarding the time fixed by the rules?]

This is the first occasion on which this question has been raised. The dismissal of this appeal will, under the circumstances, and seeing the character of the question which has to be decided, merely inflict costs on the estate.

(*a*) 30 Ch. D. 231.

[HIGINBOTHAM, C.J. It has been held under this rule by r. Justice Williams in *Walker* v. *McKinley* (*b*) that an plication for extension of time for appealing from a final judgment ould only be granted under special circumstances and upon ecial grounds, and there were some observations made by all the dges in *In re Manchester Economic Building Society* (*c*) showing e undesirability of laying down any special conditions or principles on which the discretion vested in the Court to grant an extension time for appealing should be exercised.]

The special circumstances in this case are that the plaintiff ings the action to have the construction of the will declared.

[HODGES, J. And it is declared to their satisfaction.]

It has been declared wrongly, and that in so apparent a way at the question is bound to crop up between the persons acting trustees and any third persons with whom they deal. They are and to be trustees when they are clearly not the trustees.

[HIGINBOTHAM, C.J. Should we anticipate future difficulties? this proceeding the meaning of the will is decided.]

The question is whether the plaintiffs or the defendants are stees.

[HIGINBOTHAM, C.J. What view do the beneficiaries take?]

Shiels for all the beneficiaries in the colony stated that they re quite satisfied with the order already made.

[HOLROYD, J. Mr. Topp, why should not the order made be inding order?]

Topp—It cannot bind persons not parties. As soon as the rsons adjudged to be trustees sell, the purchaser will take the ection, and he cannot be bound by this order.

[HODGES, J. The same might be said of the order of this urt.]

A purchaser seeing the opinion of the Full Court would probably satisfied. No costs and no injustice would be inflicted by anting the indulgence asked.

HIGINBOTHAM, C.J., delivered the judgment of the Court *oram* HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.] We

(*b*) 11 V.L.R. 366. (*c*) 24 Ch. D. 488.

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think that this objection must prevail. This is an appeal from a decision in Chambers coming within rule 24 of Order LIV. It is an appeal from a decision on an originating summons. That decision being an order made by a judge in Chambers, and not being an order of the Court, does not come within the provisions of rule 15 of Order LVIII., by which a period of one month is given for appeal instead of eight days as provided by rule 24 of Order LIV. A comparison of these orders and rules may explain the misapprehension which appears to have existed on this subject. Under the English orders and rules there was a distinction distinctly drawn between appeals from a judge in Chambers to the Queen's Bench Division and appeals in the Chancery Division. Order LIV., r. 24, of the English Rules begins with the words "In the Queen's Bench Division." The heading of the Order, Part II., is the same, and the rules in that part correspond with the rules of the old common law jurisdiction of the Court. In Order LVIII., r. 15, the words in the English rule are "No appeal to the Court of Appeal," etc. Those words "to the Court of Appeal" are left out in the corresponding rule in this colony. It was, therefore, clearly the intention of our rules to abolish the distinction between appeals from the common law side and the old equity side of the Court, whereas that distinction is still preserved in England. The omission to notice the difference of the words used in our rules may explain the misapprehension that is stated to have existed in the profession, but we have no hesitation in finding that the time for appealing from an order of a judge in Chambers made upon an originating summons is eight days. The objection must therefore prevail.

We have been asked to extend the time for bringing this appeal under the provisions of rule 7 of Order LXIV., but we have not been furnished with any special reasons or grounds for complying with the application, and no suggestion has been made which leads us to think that it is either necessary or highly expedient in the interests of the litigants that the application should be granted.

The appeal will be dismissed; but it will be dismissed without costs for the same reason as influenced our decision in the last case. The beneficiaries in this case should be paid their costs out

the estate. The Court does not intend to intimate that the intiffs may not be entitled to take their costs out of the estate. e Court simply does not mention them.

Solicitors for appellants: *Davies, Campbell & Davies.*
Solicitors for defendant beneficiaries: *Anderson & Son.*

A. J. A.

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pyright Act 1890 (*No.* 1076), *ss.* 21 *and* 25—*Copyright*—"*Book*"—*Pamphlet*—*Compilation from public registries*—*Labour, time, and skill*—*Piracy*—*Requirements of entries for registration of "book"*—*Daily and weekly issue of periodical*—*One registration only*—*Copyright in result of services of clerk*—*Injunction.*

Pamphlets containing compilations or condensations of entries contained in the ks of the Registrar-General (*e.g.*, notices of intention to file bills of sale), accessible verybody on payment of fees, may be the subject of copyright, if such compila- s or condensations require, besides the expenditure of considerable time and our, some appreciable skill, however small, and however small a portion of such phlets are pirated by others, the proprietors are entitled to have the infringement rained, provided they have been duly registered as proprietors.

Such pamphlets were issued during the week, daily on the first five weekdays, and kly on Saturdays, the weekly issue being a reproduction of the five daily issues. e weekly issue of the 27th June 1891 was among several others registered, and the ister, besides stating the date of the issue, gave the "date of first publication" as 5th January 1891.

Held, that for the purpose of being registered as a book under sec. 21 of the *pyright Act* 1890 (No. 1076), the date of the issue was the date of first publication he book; and, as that date was not stated to be the date of first publication, it was a good registration of the book.

Held further, that for the purpose of registration as a periodical under sec. 25, it s not necessary that there should be a separate registration of the daily issue and the weekly issue; that as the weekly issue was merely a reproduction of the five y issues one registration sufficed, and that the date of the first publication of the iodical was that of the first daily issue.

Where the owners of a pamphlet employed a clerk to take extracts from a public ister, and condense or compile them in lists for publication in the pamphlet upon terms that the result of his labours was to be their property absolutely, the ners are entitled to the copyright therein as soon as his services are paid for.

Where a defendant has been illicitly copying matter from the plaintiffs' periodical e Court should do more than merely restrain the repetition of such copying, and uld extend the injunction to such copying as may be reasonably expected thereafter.

ACTION by Thomas Murray Hall and James Best, trading as . M. Hall & Co., against the defendant Albert Henry Whittington,

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trading as Whittington & Co., for damages for infri
their copyright in a publication called *Hall's Mercantile*
for an injunction to restrain the continuance of such infr

The plaintiffs were the owners, printers, and publ
publication published in Melbourne, called *Hall's*
Gazette, issued daily from Monday to Friday inclusive in
and weekly on Saturdays when the issue was compiled fr
previous daily issues. The publication consisted of a la
of information collected for the public, principally by sea
at the public registry offices, and presented in the form
bills of sale and notices of intention to file same, stock
and renewals, liens on crops or wool, contracts, in
dissolutions of partnership, sheriff's sales, applications
and administration, dividends, notices to creditors, and
particulars, as well as advertisements. The defenda
owner of a weekly paper, published in Ballarat, called t
Traders' Protection Gazette, containing among other thi
of intention to file bills of sale which had been copie
plaintiffs' paper.

Madden and *Mitchell* for the plaintiffs—There is
whatever that the defendant copied the lists of notices o
to file bills of sale from the plaintiffs' paper, for bo
purposely published by the plaintiffs have subsequentl
in the defendant's paper, but the defendant has rai
defences. He alleges that the plaintiffs' publication is
respect of which any copyright can exist, that the po
the plaintiffs allege that he has pirated is *publici juri*
the information published can be obtained by anyone wh
shilling and searches the books of the registry, that
composition or compilation but a mere transcript of the
books, and that if there is any copyright in anybody i
Registrar-General. To that the plaintiffs say that it
pilation requiring a large amount of skill, and involving
able amount of brain work, and a compilation may be
of copyright if it involves other labour than that of mer
Wilson v. *Luke* (*a*); *Copinger on Copyright* (2nd ed.),

(*a*) 1 V.L.R. (Eq.) 127.

if it reduces matter to a form of utility to other people: *Trade xiliary Company* v. *Middlesborough and District Tradesmen's otection Association* (*b*), which was a compilation of lists of istered bills of sale and deeds of arrangement; *Cate* v. *Devon l Exeter Constitutional Newspaper Co.* (*c*). Then it is said t, under the Statute, the plaintiffs' publication is not capable of ng registered. Sec. 15 of the *Copyright Act* (No. 1076) provides copyright in a book, and "book" is defined by sec. 3 to mean include among other things every newspaper, pamphlet, sheet letterpress separately published. It is submitted in the first ce that the plaintiffs' publication is a newspaper within the Act, it contains all sorts of mercantile news: *Walter* v. *Howe* (*d*); r v. *Land and Water Journal Co.* (*e*). But even if it be not, it pamphlet, or each number is a sheet of letterpress capable of istration as a book. A musical composition published on a gle sheet of paper is a book: *Clementini* v. *Golding* (*f*); *White Geroch* (*g*); or a song published on a single sheet of paper: me v. *Dale* (*h*). Further, if there is any doubt as to the istration as a book, the registration is a sufficient registration a periodical under sec. 25, the weekly issue being a mere roduction of the daily issue.

Irvine for the defendant—I am prepared to admit that each he plaintiffs' pamphlets is a book within the meaning of sec. 15 the Act, but each pamphlet has not been registered as a book, l sec. 21 requires that to be done. Failing the registration of h issue the plaintiffs are only entitled to sue in respect of such tter as has been copied from numbers which have been istered: *Murray* v. *Bogue* (*i*). The plaintiffs' publication is a serial or periodical capable of registration under secs. 25 and because those sections apply only to cases in which persons employed to compose matter for newspapers and magazines on ms of the copyright in their work being in their employers. this case a clerk was employed to take copies, condensed in part

(*b*) 40 Ch. D. 425.
(*c*) Ibid., p. 500.
(*d*) 17 Ch. D. 708.
(*e*) L.R. 9 Eq. 324.
(*f*) 2 Camp. 25.
(*g*) 2 B. & Ald. 298.
(*h*) 2 Camp. 27 n.
(*i*) 1 Drew. 353.

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of the notices of intention to file bills of sale. There w work or skill required in what he did, and no compositio if there was, the copyright therein is in him, and there is of a sale by him to the proprietors, nor any evidence employed on terms of the copyright being in the That is one of the conditions precedent to proof of registration: *Walter* v. *Howe* (*k*). It is further sub there can be no copyright in anything not requiring and labour; no amount, either of mechanical or pu labour can be the subject of copyright: *Wilson* v. *Luk* not necessary for the defendant to contend that th itself may not be the subject of copyright—poss arrangement it might be so registered. The distinct copyright in respect of the arrangement and in re subject matter is dealt with in *Barfield* v. *Nicholson* (*m*

[HOLROYD, J. Does not the Act of Parliament whole work as a work?]

As a book only; but it has not been registered a then the date of first publication would be the date of t issue. Even as a book there is no copyright in the its registration as a book protects the copyright in su are the plaintiffs' property, that is all. The principle case as the present are dealt with in *Copinger* o (2nd ed.), 87, etc. *Cox* v. *Land and Water Journal* which the plaintiffs rely, was dissented from in *Walter*

[*Madden—Kelly* v. *Morris* (*o*) and *Morris* v. *As* to the same effect.]

Both those cases are explained in *Morris* v. *Wright* is now no common law copyright; all is contained *Copinger on Copyright* (2nd ed.), 29 and 31.

[HOLROYD, J. I see I used an argument in *Wils* which commends itself to my mind now, that the Victorian Acts assume that a man has a copyright at c Is not that so? Does not our Act assume that it exists law?]

(*k*) 17 Ch. D. 708.
(*l*) 1 V.L.R. (Eq.) 127.
(*m*) 2 Sim. & Stu. 1.
(*n*) L.R. 9 Eq. 324.
(*o*) L.R. 1 Eq. 697.
(*p*) L.R. 7 Eq. 34.
(*q*) L.R. 5 Ch. 279.

A certain common law right did and does exist independently of the Statute, but it is wrongly called copyright: *Tuck* v. *Priester* (*r*).

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Mitchell in reply—Sec. 25 of the Act applies to two sets of cases. The first part of it does not require an express agreement as to copyright, but relates to such a case as this, where a proprietor employs persons at a salary or wages, or at any regular remuneration to collect information or news, or compile matter to be published in his work. He also referred to *Wilson* v. *Rowcroft* (*s*); *Newton* v. *Cowie* (*t*); *Matthewson* v. *Stockdale* (*v*).

Cur. adv. vult.

July 18.

HOLROYD, J. The plaintiffs Thomas Murray Hall and James Best, trading as T. M. Hall & Co., were the proprietors, printers, and publishers of a publication called *Hall's Mercantile Gazette*, which they describe as a pamphlet, and which they issued daily on five days of the week, beginning with Monday, and weekly on Saturdays, the weekly issue being compiled from the five preceding daily issues. Etymologically each copy of every issue was a pamphlet, consisting of a few sheets of paper printed and stitched together but unbound; and I prefer to call the respective series of issues daily and weekly periodicals, meaning thereby publications which appear at regular intervals, though these may be sometimes unequal, as in the case of a daily newspaper which skips Sundays and Good Friday, and a weekly newspaper which is published on Saturday only. Possibly it would be more correct to say that the plaintiffs were the proprietors of two periodicals, but it will be at least more convenient to speak of them as one. The first daily issue of *Hall's Mercantile Gazette* was published on Monday the 5th of January 1891, and the first weekly issue on the 10th of the same month. A periodical of precisely the same character had been originally started by the plaintiffs under the name of *Mercantile Gazette*, the first issue of the *Mercantile Gazette* having appeared in the first week of January 1888. At the end of each half year

(*r*) 19 Q.B.D., p. 53.
(*s*) 4 A.J.R. 57.
(*t*) 4 Bing., p. 245.
(*v*) 12 Ves. 270.

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copies of all the weekly issues for the half year were bound up in one volume. A specimen of these volumes, containing the weekly issues for the last six months of 1891, was exhibited. It was numbered Volume VIII., and the copies bound up were numbered consecutively from 1 to 26 inclusively. So far, therefore, as regards the weekly issues the numeration of the periodical was not altered by the change of name. The defendant Albert Henry Whittington, trading as Whittington & Co., was the proprietor and publisher of another weekly periodical, described by the defendants as a circular, and called *Federal Traders' Protection Gazette*, which on and since the 22nd April 1891 had been published under that name; but before that date, during the months of January, February, and March, and part of April, had been published under the name of *The Traders' Protection Gazette*. The defendant Macdonald had been continuously employed by Whittington to print this periodical. The plaintiffs' pamphlets furnished to persons engaged in mercantile pursuits a variety of useful information, obtained principally by searches made at the different public offices, and partly, as I gather from its nature, from advertisements in the newspapers, and presented in the form of descriptive lists, as of bills of sale, notices of intention to file such bills, stock mortgages and renewals, liens on crops or wool, contracts, insolvencies, dissolutions of partnership, sheriff's sales, applications for probate or administration, dividends, notices to creditors, and other such like particulars. These had been extracted from the registers, or from the documents filed or matters advertised, and constituted the whole contents of the pamphlets, with the addition of some announcements relative to agency business which the plaintiffs were prepared to undertake. Fees were paid for various items of information obtained from the public offices. All the information which they collected from every source cost the plaintiffs from 1,000*l.* to 1,200*l.* per annum. They were paying in fees to the Registrar-General's office to the amount of from 400*l.* to 600*l.* per annum on the average. As regards notices of intention to file bills of sale they paid one shilling for the Index every time their clerk used it, and indeed for every time he came to examine the documents whether he used it or not, and also one shilling for each notice which he examined. The fees paid by the firm for searches for such notices in the year 1891 amounted

about 110*l.* The plaintiffs kept a searching clerk, who received salary of 55*s.* a week. He was supervised in the conduct of his ties by their manager. The manager and the clerk detailed in idence the character of the work at the Registrar-General's office. We look first," the manager said, "at the Index. Having taken to a certain serial number the day before, we start with the next mber, and get all the documents filed since then and examine em, and epitomise or extract in the most concise form what we ink will be of interest to our subscribers. We have to read all e documents. We never copy out the whole document. The sults of the clerk's researches are submitted to me as manager." dgment and discrimination were requisite in the manager's inion for the performance of the searching officer's duties, and e officer was trained to his business. The training must have been ght, as the clerk learnt in a fortnight how to search and epitomise. t in summarising a number of miscellaneous documents some ill must have been needed, and occasionally perhaps, in the ridgement of such as were lengthy, special, or complicated, a od deal. With respect to the particular portions of the plaintiffs' riodical which the defendants are accused of pirating, the notices intention to file bills of sale, a modicum of intelligence would most cases have sufficed to put them into shape. Sometimes, ough rarely, the notices filed may have been in a less simple form an that prescribed by Statute; sometimes, as Bilsborow the erk deposed, the property and the consideration may have been scribed as fully as in the bill of sale. The only parts that could er have stood in need of abbreviation, or that could have easily ve admitted of it, were the description of the property and the nsideration. For the most difficult of abbreviations in the scription of the property nothing more could have been required an a facility for running through a catalogue, and of distinguishing e various classes of articles enumerated, and the comprehension of few technical or legal terms in common use. The consideration could ldom have been long; seldom otherwise than simple. Still even this work there was room for thought, and the operation was not erely mechanical. In general in condensing the materials out of hich the plaintiffs' pamphlets were composed considerable time nd labour were consumed, and a certain dexterity and expertness

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in the art of condensation were called into play. This also of the notices of intention as regarded time and la I should say that, although the skill exercised was proba this subject than in some others, yet it was appreci headings of the statutory form were altered in the plai "To be given by" was substituted for "grantor or gran be given to" for "grantee or grantees." "Property co bill of sale" was altered to "description of property," " tion" to "amount." The dates of the notices and th filing and the numbers of the notices were inserted columns. The particulars as to business or occupatio business or residence of the grantee or grantees wer The subdivisions of the statutory headings were als These changes in form and omissions would form p general scheme or design of the work adopted by the their manager. The manager also may have been called time to time to exercise a discretion as to what por matter submitted to him he should allow to appear in pr

In order to prove the due registration of their pe plaintiffs put in evidence, partly by certified copies and producing the book itself, certain entries in the R Proprietors of Copyright of Literary, Dramatic, a Productions, of which the following is a table divided same headings as those adopted in the Register, viz.:—

REGISTER OF PROPRIETORS OF COPYRIGHT OF LITERARY, DRAM MUSICAL PRODUCTIONS.

Number.	Date of Registration.	Title of Book, etc.	Name and Address of Publisher and Place of Publication.	Date of first Publication.	Nam A Pro
3,339	31/12/87	*Mercantile Gazette.* (A copy deposited)	T. M. Hall & Co., Melbourne.	1/1/88	T. M I b S
4,958	9/6/91	*Hall's Mercantile Gazette.* Published weekly. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co., Melbourne.	10/1/91	T. M b la B N W

REGISTER OF PROPRIETORS OF COPYRIGHT OF LITERARY, DRAMATIC, AND MUSICAL PRODUCTIONS—*continued.*

Number.	Date of Registration.	Title of Book, etc.	Name and Address of Publisher and Place of Publication.	Date of first Publication.	Name and Place of Abode of the Proprietor of the Copyright.
960	9/6/91	*Hall's Mercantile Gazette.* Daily issue. (Copy deposited).	T. M. Hall and James Best, trading as T. M. Hall & Co., Melbourne.	5/1/91	T. M. Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
988	29/6/91	*Hall's Mercantile Gazette.* Daily issue, 24/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co., 349 Collins St., Melbourne.	5/1/91	Thomas Murray Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
989	29/6/91	*Hall's Mercantile Gazette.* Daily issue, 25/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co., 349 Collins St., Melbourne.	5/1/91	Thomas Murray Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
990	29/6/91	*Hall's Mercantile Gazette.* Daily issue, 26/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co., 349 Collins St, Melbourne.	5/1/91	Thomas Murray Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
991	29/6/91	*Hall's Mercantile Gazette.* Weekly issue, 27/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co., 349 Collins St., Melbourne.	5/1/91	Thomas Murray Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
005	1/7/91	*Hall's Mercantile Gazette.* Daily issue, 29/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co.	5/1/91	T. M. Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
003	1/7/91	*Hall's Mercantile Gazette.* Daily issue, 30/6/91. (Copy deposited.)	T. M. Hall and James Best, trading as T. M. Hall & Co.	5/1/91	T. M. Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.
011	3/7/91	*Hall's Mercantile Gazette.* 1/7/91. (Copy deposited.)	Thomas Murray Hall and James Best trading as T. M. Hall & Co., Collins St., Melbourne.	5/1/91	T. M. Hall, Brisbane, Queensland, and James Best, Sydney, New South Wales.

No. 3,339 is the first registration of the plaintiffs' periodical under s earlier name of *Mercantile Gazette.* The first of January in the

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year 1888 fell on a Sunday, and I presume the *Gazette* was not actually published on that day. Probably the actual publication took place either a day sooner or later, and the object of inserting a wrong date was that the periodical might appear to begin with the new year; but if the matter is of any importance, it has been left in obscurity. Two objections were taken to the validity of this registration; first, that the entry preceded the publication; and secondly, that the place of abode of the proprietor was insufficiently described, "Melbourne" having been omitted. Nos. 4,958 and 4,960 give the respective dates of the first publication of the daily and weekly issues of the periodical under its later name of *Hall's Mercantile Gazette*; and at the same time point the distinction, taken by the plaintiffs themselves, between the two, as separate publications commenced on different days. The seven numbers, beginning with 4,988 and ending with 5,011, show a week's registration of consecutive issues, and indicate that the practice was to register every issue, although I cannot say if it was always followed. It will be observed that they commence with three dailies on the 24th, 25th, and 26th of June, Wednesday, Thursday, and Friday; then comes a weekly on Saturday, the 27th; Sunday intervenes, and three more dailies follow on the 29th and 30th, and the 1st of July. In these registrations several minor flaws and omissions may be detected, to one or two of which I shall have to allude presently.

The plaintiffs allege that they were the duly registered proprietors of their pamphlets, referring to the daily and weekly issues of their periodical, or to their daily and weekly periodicals, by whichever name these publications should properly be called, and charge the defendants with having infringed their "copyright in their said pamphlets respectively" by pirating the information supplied by them in the record of notices of intention to file bills of sale, published regularly in the said pamphlets. They complain that this piracy has been systematic and continual, and that the defendants by copying the record so supplied have appropriated the fruits of their industry, skill, and expenditure, and so have been enabled to sell their own periodical at a cheaper rate than the plaintiffs can afford to sell theirs, and to injure thereby the circulation of the plaintiffs' pamphlets. The defendants were

guilty of copying from the plaintiffs, if that be an offence. They were detected by the not uncommon contrivance of publishing false notices, which they faithfully reproduced. After much studied reticence and some evasion certain admissions were extracted from Mr. Whittington. He was publishing in each weekly issue of his *Gazette* a record similar to the plaintiffs of these notices of intention; but he paid no fees at the Registrar-General's office, nor employed any person to search on his behalf. "During the months," he says, "of January, February, March, April, May, June, and July 1891, I furnished the defendant Macdonald with copies of the weekly issues of the plaintiffs' *Gazette*, and with other records and information with respect to notices of intention to file bills of sale, and instructed Macdonald on my behalf to compile Whittington & Co.'s *Gazettes*, from information contained in the plaintiffs' *Gazette*, and from other information supplied by me to him. I believe the defendant Macdonald did at various times during the said months, in accordance with the instructions given by me to him, copy some of the particulars published in some of the defendants' *Gazettes* from some of the issues of the plaintiffs' pamphlets called *Hall's Mercantile Gazette*." As the defendants either could not or would not disclose from which of the plaintiffs' weekly issues they did not pilfer during those months, I conclude that they pilfered from all of them. Mr. Whittington further confesses that Macdonald copied from the plaintiffs' weekly pamphlet of the 27th of June 1891, already mentioned as numbered 4,991 in the book of registry, three notices which he specifies, and which he had published in his own circular of the 31st of June, an impossible date, but actually borne by the circular.

The defence set up is, first, that the plaintiffs could not have any copyright in their pamphlets, considered separately or taken together, inasmuch as separately they were mere transcripts of entries in the books of the Registrar-General, and were therefore not books within the meaning of sec. 15 of the *Copyright Act* 1890, and taken together they did not come within the description of any of the works enumerated in sec. 25 of that Act, not having been composed on the terms that the copyright should belong to the plaintiffs; secondly, that the information alleged to have been pirated, being a mere transcript, was not a proper subject of

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copyright; thirdly, that the plaintiffs were not the authors or assigns of the authors of any of the matter contained in the said pamphlets; and generally, that the statement of claim disclosed no cause of action. The due registration of any of the plaintiffs' pamphlets either as a book or periodical was not admitted.

The 15th section of the *Copyright Act* 1890 provides that the copyright in every book which has been first published in Victoria in the lifetime of its author is to endure for the natural life of the author and for the further term therein mentioned, and is to be the property of the author and his assigns. The 20th section provides that a book of registry shall be kept, wherein may be registered as thereinafter enacted the proprietorship in the copyright of books and in dramatic or musical productions; and by the 21st section it is enacted that it shall be lawful for the proprietor of copyright in any book first published in Victoria to make entry in the registry aforesaid of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book or of any portion of such copyright. These sections correspond with secs. 14, 19, and 20 of "*The Copyright Act* 1869" (No. 350). "Book" includes every volume, part or division of a volume, newspaper, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published: No. 1076, sec. 3; No. 350, sec. 2. "Proprietor" means the author of any book unless the author has executed his work on behalf of another person for a good or valuable consideration, in which case such other person is to be considered the proprietor, and is entitled to be registered in place of the author: *Ibid.* By sec. 29 of No. 1076 the proprietor of any copyright, except in a lecture, is precluded from bringing an action for infringement of it, unless he shall have first caused an entry to be made in the registry in the manner prescribed.

According to the sections just quoted each separately published pamphlet of the plaintiffs' was a book. Each was composed for the plaintiffs by the joint labours of persons employed and paid by them; or, in other words, the authors executed their work on behalf of the plaintiffs for a valuable consideration, and the plaintiffs therefore were to be considered as proprietors of the

copyright, if there was any, in the book, and were entitled to be registered in the place of the authors. These pamphlets, as I have already found, were not mere transcripts of entries contained in the books of the Registrar-General, but compilations derived from sources accessible to everybody, or to everybody who could pay the fees where fees were exacted. Time and trouble, money and skill, were expended upon them, and they were fit subjects for copyright. One of these pamphlets, that of the 27th of June 1891, had been pirated by the defendants. They had wrongfully copied from it certain items, and however small the portion appropriated, the plaintiffs were nevertheless entitled to have the infringement of their copyright restrained, provided they had been duly registered as proprietors: See *Kelly* v. *Morris* (*w*). The entry No. 4,991 in the register, relating to that pamphlet, sets out correctly all the particulars required by the 21st section, excepting that it gives as the date of first publication the date of the first daily issue of the periodical, which is not correct for registration of the pamphlet as a book. It actually mentions the date of the pamphlet, which for that purpose is the true date of first publication, but does not mention it as the date of first publication. In fact the registration purports to be the registration of the periodical and not of the book, and for that reason is not in my opinion, although I feel a good deal of doubt upon the point, a good registration of the book. Sec. 23 of the *Copyright Act* does not relieve the plaintiffs from the obligation of proving a sufficient registration.

The writ in this action was issued on the 3rd of July 1891, and there can be no doubt I think that for half a year previously at least the defendants had been systematically availing themselves of the results of the plaintiffs' expenditure by transcribing their lists of notices, or parts of such lists, into Whittington's *Gazette*, which in all reasonable probability would have injured the sale of the plaintiffs' periodical, although no actual damage has been proved. The defendants confessed to purloining from the weekly issues, and if so they purloined from the dailies, of which the weeklies were a reproduction. The plaintiffs having failed to prove a violation of their copyright in any book, in respect of which they are at liberty to sue, must, in order to obtain redress, fall back upon their right

(*w*) *Per* Wood, V.C., L.R. 1 Eq., at p. 701.

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if any, under the 25th section of the *Copyright Act* 1890, or the corresponding section, the 24th, of the Act of 1869, whereby the conductors or the proprietors of a periodical work, when certain articles therein contained have been composed by a person or persons employed by them upon the terms that the copyright in such articles shall belong to them, and they have paid for those articles, acquire the property in the copyright of the articles so composed and paid for, and enjoy the same rights as if they were the actual authors thereof. Such conductors or proprietors however would still be prevented by sec. 29 from proceeding in respect of the violation of the copyright in any such article unless before commencing the action they had caused an entry to be made in the registry pursuant to the Act. Now what sort of entry should this be? I think it should be an entry of the same particulars as would have to be put upon the register if the proprietor of the copyright in the periodical were making the entry. In terms the 26th section only recognises registration by the proprietor of the copyright in the periodical, and not by the proprietor of copyright in the article only which is sought to be protected. This section establishes for the proprietorship of copyright in periodicals a method of registration similar to that established by sec. 21 for the proprietorship of copyright in books, consisting of certain particulars relative to the periodical, namely, the title, the time of the first publication of the first volume, number, or part thereof, and the name and place of abode of the proprietor thereof (*i.e.*, of the work), and of the publisher when such publisher shall not also be the proprietor. There is one remarkable difference. In the case of a book it is the name and place of abode, not of the proprietor of the book, but of the copyright in the book, or of any portion of such copyright, that is to be entered. But whatever may be the reason of this difference, sec. 25 contemplates the case as well of the proprietor of a book simply as of a periodical having copyright not in the whole work but in the article only, and unless the copyright in the article can be protected by registry as directed for copyright in a periodical or book by sec. 26 or sec. 21, it cannot be protected at all. The notices that appeared in the plaintiffs' pamphlets daily and weekly were prepared by Bilsborow their searching clerk, who entered their service upon the terms that the results of his

searches were to be their property absolutely, which I think gave the plaintiffs the copyright in the notices when paid for. The clerk was really the compiler. Harrison, the manager, only supervised his work, and may have occasionally struck out or altered a word or two, as the editor of a newspaper may alter a passage in a leading article of which a contributor is the author. Bilsborow received a salary which was paid weekly; and as Whittington's *Gazette* was published on Wednesdays, and whatever was purloined was taken from the lists published by the plaintiffs during the previous week, the fair inference is that Bilsborow's work was composed and paid for, and therefore that the copyright in it passed to the plaintiffs on each occasion before it was pirated.

In the next place, has the plaintiffs' periodical been ever properly registered? That involves the consideration of some apparently insignificant but very troublesome details. It was insisted by Mr. Irvine that the date of first publication of *Hall's Mercantile Gazette* was the date of the first publication of the earlier periodical, *Mercantile Gazette*. I think that when the name of the periodical was changed, it was proper, or certainly not improper, for the proprietors to register it again, and in the new registration to give the date of the first issue under the new name as the date of first publication. Upon the question whether there should have been one registration for the daily issues and another for the weeklies, that is to say, whether there were two periodicals or only one, I think that as each weekly was merely a reproduction of five dailies one registration sufficed, and that the date of the first publication of the periodical was that of the first daily issue. The registered entry of the 9th of June 1891, numbered 4,958, which relates to one of the weeklies, and is the only one that states the date of first publication as on the 10th of January 1891, gives "Melbourne" only as the address of the publisher and place of publication, and I doubt if this complies with the 26th section. But if I am right in holding that the date of the first daily issue is the true date of the first publication of the periodical, then the entry of the weekly issue of the 27th of June 1891, numbered 4,991, is unimpeachable; and the entries numbered 4,988, 4,989, and 4,990, of the three dailies of the 24th, 25th, and 26th of June, the registration of all of which v

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effected on the 29th of that month, are also all perfect. The plaintiffs must therefore be entitled to some injunction, but it is very hard to say what. Two English cases recently reported bear a close resemblance to the present one, namely, *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (*x*); and *Cate* v. *Devon and Exeter Constitutional Newspaper Co.* (*y*). In each of these cases there were three plaintiffs, each of whom was the proprietor of a periodical issued weekly to subscribers only, and containing lists with particulars of bills of sale and deeds of arrangement extracted from the registers, lists of bankruptcies, and other similar matter likely to be useful to persons engaged in trade, besides a short leader on some mercantile subject. The plaintiffs jointly employed and paid two persons to make the proper searches and prepare the lists, which were identical in each periodical. Fees were paid for every bill of sale and deed inspected. The members of the defendant Association in the first case were tradesmen residing in Middlesborough and its neighbourhood, each of whom received weekly from the Association a single sheet of letterpress, relating wholly to topics of purely local interest. A small portion of this matter, not exceeding about four entries a week out of four hundred, was copied from the plaintiffs' lists. It was held that each plaintiff having registered his periodical had a right to sue to restrain the infringement of his copyright, or his portion of the copyright, in the articles which had been composed for the plaintiffs jointly and jointly paid for by them. In the second case the defendant company had published in three issues of their weekly newspaper, the list of deeds of arrangement for the county of Devon, which had appeared for three successive weeks in the plaintiffs' periodicals; but they had not purloined the information directly. One of the plaintiffs had printed a number of copies of his periodical with a different heading, which he supplied to the London Association for Protection of Trade to be distributed amongst the members, of whom the defendant was one; and it was from the copy so supplied to him that the defendant had taken the lists which he published. An injunction was nevertheless granted. See also *Walter* v. *Howe* (*z*). In *Trade Auxiliary Co.* v. *Middlesborough, etc., Association* the injunction was limited to

(*x*) 40 Ch. D. 425. (*y*) 40 Ch. D. 500. (*z*) 17 Ch. D. 708.

infringements past or future of then existing copyright in existing articles, but refused as to the possible future violation of copyright in then unpublished matter, in which the plaintiffs might thereafter acquire copyright. In *Cate* v. *Devon, etc., Newspaper Co.*, it was confined to the matter common to the three numbers of the defendants' newspaper to which the evidence related, and the three corresponding numbers of the plaintiffs' periodical. In thus narrowing the scope of the injunction it seems to me that the Court took a rather narrow view of its own jurisdiction, and I am somewhat astonished that the decision should have been acquiesced in so readily. In each instance it passed without argument. The judgment of the Court was valuable as a declaration of right; but practically the injunction granted was worthless. When a right that has been, and is being acquired from day to day or from week to week has been persistently violated in the past as soon as acquired, and in all likelihood will continue to be so violated in the future, is the Court so powerless that it cannot by anticipation prohibit this manifest wrong? In cases of this kind to restrain a repetition of the illicit copying of what has been copied is futile. The same dish is never served up a second time. Injustice in restraining the illicit copying, which may otherwise be reasonably expected hereafter, there is none. Before a person can be attached for breach of any injunction the breach must be proved; and if the right to be protected is one to be acquired, proof of the acquisition will be part of the proof of the breach. Speaking of telegrams, which the proprietors of *The Argus* newspaper were in the habit of procuring from England at great expense and publishing in their journal, and the piracy of which they were seeking to restrain, that learned judge, the late Sir Robert Molesworth, observed:—"The argument most urged for the defendant is that there is no property in unpublished news, so that there is nothing to protect before publication; but this appears to me to be a property from day to day acquired, which is habitually infringed as soon as acquired with such speed that no effectual remedy could be found after the publication. If I were granting an injunction against diverting a running stream, I should be dealing as to water now in the clouds before it descends in rain; or, if the injunction lasted longer, as to water now in the ocean before it ascends by

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evaporation": *Wilson* v. *Luke* (*a*). These observat
less applicable to the plaintiffs' lists. A piracy c
committed by the defendant takes time to prove, and
it can be proved the mischief has been done. No man
to go on bringing actions to recover only his costs as be
and party. I think I shall be acting consistently with
common sense, if I order that the defendants their
servants be restrained from printing or publishing an
colourably altered copies of or extracts from any articl
or information relating to such notices of intention to
sale as in the pleadings mentioned which has or have here
the 29th day of June 1891 been or may hereafter be p
the plaintiffs' periodical called *Hall's Mercantile Ga*
the copyright of which at the time of the publication
plaintiffs' were or may be entitled and that the defend
the plaintiffs' costs of this action. Order accordingly.
apply.

Solicitor for plaintiffs: *W. H. Lewis.*

Solicitors for defendant: *Ford & Aspinwall* for *Wan*
Ballarat.

(*a*) 1 V.L.R. (Eq.), p. 140.

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pany—Suit by shareholder on behalf of himself and other shareholders—Transactions entered into with strangers—Ultra vires—Parties—Form of suit.

Where an individual shareholder in a limited company sues on behalf of himself all other shareholders in the company, except the defendants, the directors of the pany and the company, to have it declared that certain transactions entered into veen the company and other persons were *ultra vires* of the directors and efore void, and seeking to make the directors personally refund the loss ained by the company thereon, such other persons are necessary parties to the on.

In the absence of any special circumstances, such as if it is not possible to get the pany to sue, or if the majority of the shareholders in the company are against ng proceedings, the company (in liquidation) is the only proper plaintiff to sue directors to recover money of the company expended in transactions which were *a vires* of the directors. An action for such purpose by a shareholder on behalf imself and all other shareholders except the directors, making the company a ndant, cannot be maintained in the absence of special circumstances.

ACTION by John Nankivell on behalf of himself and all other reholders in the Imperial Banking Company, except the endants, against Sir Benjamin Benjamin, John McGee, gh Myles Phillips, and George Withers, who were directors of company, and George Elliot, the vendor to the company of ain land, and the company itself, now in liquidation, to set le certain transactions entered into by the directors of the pany as being *ultra vires*, and for a refund of the moneys lost the company through such transactions having been entered .

The Imperial Banking Company had no power to speculate in l, and the directors desiring to so speculate took steps to get articles of association altered so as to give them authority, a meeting of shareholders was accordingly called and held 13th June 1888, at which a special resolution was passed powering the directors to invest the funds of the company in purchase of real estate, and to resell it. Such resolution was y confirmed on 28th June 1888, but meanwhile the defendant rke, who was the manager of the company, entered into an eement with the defendant Elliot, to purchase from him certain l at the corner of King and Lonsdale Streets for 40,000*l*. The tract was made by Clarke personally, but the plaintiff alleged

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that it was entered into by him on behalf of the company. On the 18th January 1889 Clarke executed an acknowledgment and declaration that he had bought the property as agent for the company, and the company similarly acknowledged. Certain payments under the contract were afterwards made by the company. This transaction was impeached as being *ultra vires* the powers of the directors, and the plaintiff claimed that all moneys paid by the company on such contract should be refunded to it. Clarke, besides being the manager of the company at the time this transaction was entered into, was also a member of the firm of Bradley & Curtain, auctioneers and estate agents, who received a commission on the transaction. Some doubt was raised as to whether Clarke entered into the transaction for himself, or as agent of the firm, for the cheques paid were drawn by Bradley & Curtain, and the firm had, prior to the execution of the declaration of trust of 18th January, 1889, offered to transfer to the company their rights and liabilities under the contract. Neither Clarke nor Bradley & Curtain were parties to the action, and an objection was taken by the defendants that they were necessary parties.

The second transaction which was challenged was as follows:— On the 3rd July the Royal Land Company had purchased a quantity of land in various places, and in particular two pieces at Mitcham and one at Mornington, for which the company had got contracts, but not conveyances. The directors of that company had paid a small portion of the purchase money, but there was an amount outstanding of 11,799*l.* It was resolved to wind up the Royal Land Company, and Curtain, of the firm of Bradley & Curtain, was appointed liquidator. Curtain entered into an agreement with the directors of the Imperial Banking Company, by which the latter purchased these properties of the Royal Land Company from him as liquidator, accepting its outstanding liabilities, and giving the company a profit of 6,250*l.* to be paid by 5,000 shares in the Imperial Banking Company, paid up to 1*l.*, and with a premium of 5*s.* A document was executed on 5th October 1888 assigning to the Imperial Banking Company all the interest of the Royal Land Company in the properties, with a stipulation that the Imperial Banking Company should take over all the liabilities. An amount of 19,324. 17*s.* 9*d.* was due in respect to the land, and

with interest owing to the Bank of South Australia, the total liability was 22,672*l.* 7*s.* 7*d.* The directors in engaging in this transaction were acting without the authority of the shareholders, and the plaintiff alleged that the object of the transaction was by carrying the premium of 5*s.*, which had no existence in cash, to a reserve fund, to enable a fictitious dividend to be manufactured by the bank. The plaintiff claimed that the directors should refund to the company all moneys paid to the liquidator of the Royal Bank.

The third transaction challenged was this. The company made a second issue of shares in September 1887, and Sir Benjamin Benjamin arranged to take up 21,000 shares of this issue at 2*s.* 6*d.* per share on the condition that until he had disposed of them the company was not to make any further issue. On 10th May 1888, Sir Benjamin Benjamin transferred to Robert Curtain 20,150 shares, being a portion of the 21,000 which he held, and the firm of Bradley & Curtain wrote to the company intimating that they were willing to place a third issue of shares. On 3rd September 1889, Sir Benjamin Benjamin, who, in the meantime, had become chairman of directors of the Imperial Banking Company, reported to a meeting of directors that Messrs. Bradley & Curtain desired to pay up 28,000 shares which they held, and upon which 2*s.* 6*d.* had been already paid. He said it was desirable that Bradley & Curtain should pay up the extra 17*s.* 6*d.* per share, and he also said that he had authorised an advance from the bank to Bradley & Curtain to enable them to pay the amount. The action of the chairman was ratified by the other directors, and the advance was made on the security of the shares. In every subsequent balance-sheet of the company it appeared that Bradley & Curtain had actually paid that 17*s.* 6*d.* per share on 28,000 shares to the bank. The plaintiff sought that the directors should make good to the bank the amount of the advance to Bradley & Curtain.

Madden and *Isaacs* for the plaintiffs.

Purves, Q.C., *Higgins*, and *Mitchell* for the defendants Sir Benjamin Benjamin, John McGee, Hugh Miles Phillips, and George Withers.

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Topp and *Weigall* for the defendant George Elliot.

Irvine and *Wanliss* for the defendant the Imperial Banking Company.

After evidence for the plaintiffs had been given,

Purves, Q.C., *Higgins* and *Mitchell* moved for a nonsuit—The Court cannot do equity in this case unless the proper parties are brought before it. The plaintiffs ask that the contract of 26th June 1888 should be declared void against the company. It is, however, a contract between Clarke and Elliot, and Clarke is not a party to the action. In his absence the Court ought not to deal with the contract. Further, both as to that transaction and the others impeached, the proper party to bring the action is the defendant company. The plaintiff is not entitled to sue on behalf of himself and the other shareholders unless he shows that he has the company's consent so to do, or has been, through fraud, in a minority, and so unable to obtain the company's consent, or that the company is unable from any cause to sue: *Buckley on Companies* (6th ed.), 486; *Hare* v. *London and North-Western Railway Co.* (*a*); *Russell* v. *Wakefield Waterworks Company* (*b*); *Bryson* v. *Warwick and Birmingham Canal Co.* (*c*).

Topp and *Weigall*, for the defendant Elliot, adopted these arguments.

Madden and *Isaacs* for the plaintiff—If the act done is *ultra vires* the company or the directors, an individual shareholder may sue either alone or on behalf of all shareholders except the defendants: *Lindley on Companies* (5th ed.), 570; *Hoole* v. *Great Western Railway Co.* (*d*); *Foss* v. *Harbottle* (*e*); *Kernaghan* v. *Williams* (*f*); *Macdougall* v. *Gardiner* (*g*). Clarke is not a necessary party, because he has no outstanding interest in the matter. The evidence, it is submitted, shows that there has been a novation of contract—that Elliot, in fact, discharged Clarke and took the company in his place.

(*a*) 1 J. & H. 252, 2 J. & H. 80.
(*b*) L.R. 20 Eq. 474.
(*c*) 4 De G. M. & G. 711.
(*d*) L.R. 3 Ch. 262.
(*e*) 2 Ha. 461.
(*f*) L.R. 6 Eq. 228.
(*g*) 1 Ch. D. 13.

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[HODGES, J. I do not think I should be justified on the idence in inferring that Elliot discharged Clarke and took the mpany in Clarke's place.]

No relief is asked for against Clarke. The action is in the rm of an action against the directors for damages resulting from eir acts which were *ultra vires* the company: *In re the Liverpool ousehold Stores Association Limited* (*h*).

Higgins in reply—The proper person to sue is the company less a shareholder suing on behalf of himself and others alleges d proves that he is in a minority and cannot get the company to e: *Duckett* v. *Gover* (*i*); *Mason* v. *Harris* (*k*); *Hardy* v. *ilson* (*l*.)

Cur. adv. vult.

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HODGES, J. The plaintiff in this case is a shareholder in the mperial Banking Company, and states that he sues on behalf of mself and all other shareholders of the company excepting the dividual defendants, and the defendants other than the Imperial anking Company are Sir Benjamin Benjamin, John McGee, ugh Myles Phillips, and George Withers, who were directors of e company, and George Elliot, who was a vendor of certain land rt of the subject-matter of the suit. It appears that in the early rt of June 1888, the directors of the Imperial Banking Company sired to commence speculation in land on behalf of the company, d the defendants examined their articles of association to see if e company had power to transact such business; and not finding them any *authority to do so*, they took steps to alter their articles association in such a way as to make the articles purport to give e directors authority to speculate in land. With this object in ew there was passed at a meeting of the shareholders of the mpany, held on the 13th of June 1888, a special resolution in e words following:—

"The directors shall have power to invest the funds of the company in the rchase of real estate and to re-sell the same, with power to allow any portion of e purchase-money to remain on mortgage, either fixed or redeemable by periodical stalments, including interest extending over such term as may be agreed upon."

(*h*) 59 L.J. Ch. 616.
(*i*) 6 Ch. D. 82.
(*k*) 11 Ch. D. 97.
(*l*) 8 V.L.R. (Eq.) 289.

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That resolution was confirmed on the 28th June 1888, but before that date the manager of the company, James Clarke, who was also a partner in the firm carrying on business as estate agents under the name of Bradley & Curtain, was negotiating with the defendant Elliot for the purchase of a property at the corner of Lonsdale and King Streets, and had mentioned the matter to several of the directors of the defendant company, but casually only, and not at any meeting of the board of directors. Before the matter was mentioned at any meeting of the board of directors, and before any agreement, even oral, on the part of the board of directors to purchase the land was made, Clarke entered into an agreement with Elliot to purchase the land for 40,000*l.* or thereabouts. This contract purported to be made by Clarke, not on behalf of the company, but on his own behalf; and I find as a fact that that contract was made by Clarke, not as agent for the company, not purporting or intending to act as agent of the company, but with the knowledge that at that time he was not authorised to act as agent for the company; and I believe that Elliot was, in fact, told this, and was told that the directors had not, at that time, power to make the contract or to authorise its being made, and that, therefore, Clarke was making the contract himself. But I think that it was intended that the company should have thereafter the benefit of that contract, and I think in substance that that was told to Elliot. The firm of Bradley & Curtain, of which Clarke was a member, received on this transaction a commission of 480*l.* A deposit of 2,000*l.* was paid by a cheque of Bradley & Curtain's, drawn on the defendant company, with which company that firm had an account, and on the payment of this cheque that account was overdrawn beyond 2,000*l.* I have not expressly found whether Clarke made this contract on his own behalf or as agent of his firm, for certain of his evidence I am unable to understand, and the view I take renders it unnecessary for me to decide whether he bought as agent for his firm or whether he bought on his own account, with the intention that he would transfer the land to the company when the company should have power to take it over from him. The land having been bought, there was a meeting of the board of directors on the 3rd July, and by the minutes of that meeting it appears to have been represented

the directors by Clarke that the purchase had been made, not Clarke, but by Bradley & Curtain, and that Bradley & Curtain re willing to transfer their rights and liabilities under the ntract, and for this liberal conduct, as it was called, the firm ceived the thanks of the directors. This transfer was never ecuted, but instead of this Clarke executed, on the 18th January 89, an acknowledgment and declaration that he had bought this operty as agent for the Imperial Banking Company, and by the ne document the company made a similar acknowledgment and claration. In my opinion that was not a correct version of what had viously taken place. What took place was a purchase by Clarke, as agent for the company, but for himself or for his firm. A pay- nt of 6,000*l.* was made on the 26th July 1888, by a cheque of the fendant company, and on the 8th August Bradley & Curtain sent Gillott, Croker & Snowden two promissory notes of Clarke's, the company's, for 16,000*l.* each. Some payments under the ntract were afterwards made by the company, which, in the view ake, are not material to specify; and on these facts the plaintiff ks for a declaration that this contract was void and illegal, as ng *ultra vires* of the powers of the company; and upon the ound that it was *ultra vires* the plaintiff asks that the individual fendants, other than the defendant Elliot, should restore to the mpany all moneys paid in respect of that contract, with interest ereon, and that the company be restrained from making any ther payment on the contract. And the plaintiff further asks at Elliot be directed to repay to the company all moneys received him under that contract. It was objected by the defendants, *ter alia*, that as the company was in liquidation, and as the uidator was supporting the plaintiff's case, no injunction was cessary; and if no injunction was necessary, then the other lief asked for by the plaintiff could only be granted at the suit the company; and secondly, that the relief claimed could only granted in event of Clarke or the members of the firm of radley & Curtain being made parties to this suit. Without pressing any opinion on the first objection, I am of opinion that e second objection is good. The foundation of all the relief aimed in respect of this contract is based upon the contract eing void as being *ultra vires* the company. If it is not *ultra*

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vires, the whole claim to relief vanishes. If it be *ultra vires*, and if the plaintiff be entitled to such a declaration, then the plaintiff may be entitled to all the relief consequent upon it. But, in my opinion, it would not be right to declare a contract void, as illegal and *ultra vires*, without hearing one of the parties to the contract, who has an unmistakable and direct interest in maintaining it is not illegal and not *ultra vires*. And if authority be wanting for that proposition, it will be found in the case of *Russell* v. *Wakefield Waterworks Co.* (*m*), where Sir George Jessel says, at p. 481:—

". . . . . If the subject matter of the suit is an agreement between the corporation, acting by its directors or managers, and some other corporation or some other person, strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided once for all whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the Court the other corporation"

or person. I have added these last two words as applying to this present case. The subject matter here is an agreement between this corporation and another person, and it is in this case necessary to bring that other person before the Court; that other person, whether it be Clarke or the firm of Bradley & Curtain, has not been brought before the Court. Consequently I think that so far as the plaintiff claims relief with regard to that contract, I cannot give him that relief without the other person or persons being brought before the Court.

The next claim the plaintiff makes is in respect of a contract bearing date the 5th October 1888, between the Imperial Banking Company on the one hand and John Curtain, one of the liquidators of the Royal Land Company, on the other hand. By this agreement the defendant company purchased from the liquidator of the Royal Land Company all the land and hereditaments mentioned in a certain schedule to the agreement, together with the rights and liabilities thereunto belonging, for 6,250*l.*, to be paid for by a certain number of shares of the defendant company. If the defendant company has paid all the money that has to be paid under that contract, and this is an

(*m*) L.R. 20 (Eq.) 474.

action or proceeding only to recover back that money, and for a direction to have it paid, then, in my opinion, the plaintiff is the wrong person to sue. The proper person to sue would be the defendant company and not the plaintiff. This is shown by some of the language in *Russell* v. *Wakefield Waterworks Co.* (*n*), and in *Gray* v. *Lewis* and *Parker* v. *Lewis* (*o*). Lord Justice James, at p. 1050, says:—

"I am of opinion that there is a wrong plaintiff, that there is a wrong forum, and that there is no cause of suit by a right plaintiff in a right forum. The bill should not have been filed by a shareholder on behalf of himself and all the other shareholders. It is very important in order to avoid oppressive litigation to adhere to the rule laid down in *Moseley* v. *Alston* and *Foss* v. *Harbottle*, which cases have alway been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers or from any other person, that corporate body is the proper plaintiff and the only proper plaintiff."

He goes on afterwards to explain why that is so. So that if all the money in this case has been paid, and if this be a proceeding simply to recover that money back for the company, the company should be the plaintiff and the only proper plaintiff. I do not mean to say that the rule laid down in that case is a rule which cannot yield to special circumstances, and that there may not be exceptions to it; for instance, if it were not possible to get the company to take proceedings, or if it were shown that a majority of the shareholders of the company were against taking proceedings; but in the absence of special circumstances that general rule applies to this case. On the other hand, if the money has not been paid and the plaintiff seeks a declaration that the contract is invalid, then the same objection that answers the previous part of the claim answers this part also, viz., that the proper parties are not before the Court.

Then as to the third subject matter of the claim against the directors. With regard to this part of the claim, it appears that the directors of the company made an arrangement with the firm of Bradley & Curtain by which they advanced to Bradley & Curtain money or a credit entry which enabled them to make a debit entry, and so have certain shares paid up to 1*l.* I do not propose here to decide whether this was an advance in the

(*n*) L.R. 20 (Eq.) 474. (*o*) L.R. 8 Ch. 1035,

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proper sense of the term at all. No money went out of the coffers of the company, and no money went into the pockets of Bradley & Curtain, but there was an agreement by which the company purported to advance to Bradley & Curtain a large sum of money, enabling them to have their shares in the company, which, at that time were paid up to 2*s.* 6*d.*, paid up to 1*l.*, and the scrip was left with the company as security for payment by Bradley & Curtain of that advance or so-called advance. In this case, if this is only a suit to recover the money, I think that the same objection which applied to the last claim applies to this, viz., that the proper plaintiff would be the company. If further relief is sought, then Bradley & Curtain ought to be parties to this suit, and I think probably the proper relief would be to cancel the whole transaction and put the parties exactly as they were. The company has got the scrip; has also got the debit entry and the credit entry, and the whole transaction was *ultra vires*, and it should be wiped out, and all the persons interested should be parties to the suit. In any event in seeking to recover the money the action is wrongly conceived, as the company ought to be plaintiff, and if other relief is sought then the other person or persons should be before the Court. I therefore think that I should strike out the suit for want of parties, and I shall strike it out, without costs, except as against Elliot. As I think, however, that there was a perfectly valid contract between Elliot and Clarke, I think that he ought to get his costs.

Solicitor for plaintiffs: *Manton.*
Solicitors for defendant Elliot: *Gillott, Croker, Snowden & Co.*
Solicitors for defendant company: *Bolger & Miller.*
Solicitors for other defendants: *Hart & Benjamin.*

A. J. A.

IN THE WILL OF JOHN HAINES, DECEASED.

PINCOTT *v.* FARRINGTON.

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May 10.
July 18.

A'Beckett, J.

Will—Charitable bequest—Charity ceasing to exist—Cy pres doctrine—Lapse—Compromise for benefit of charity—Sanction of Court.

Where a testator makes a gift to a particular charitable institution which fails by reason of the institution having at the date of his death ceased to exist, the legacy will lapse, and will not be administered *cy pres*, and if it is doubtful whether the institution has ceased to exist, the Court will sanction a compromise made *bona fide* between persons who, by order of a judge, represent respectively the institution and the testator's next of kin.

ORIGINATING SUMMONS.

This was a summons referred into Court to determine who was entitled to a share in the residuary estate of the testator. The deceased died on the 26th May 1890, leaving a will, executed on the 12th July 1887. The value of the estate was 70,000*l.* and upwards. The testator, after disposing of a portion of the estate by his will, bequeathed the residue, which amounted to about 35,000*l.*, to be equally divided between the Melbourne, the Geelong, and the Colac Ladies' Benevolent Societies. There being some doubt whether this last mentioned society had not ceased to exist at the time of the death of the testator, Frederick R. Pincott, the trustee and executor under the will, took out the present originating summons for the purpose of obtaining the decision of the Court as to who was entitled to the one-third of the residue bequeathed to this society. The defendants upon such summons were Mrs. Elizabeth Jane Farrington, once the secretary and treasurer of the Colac Ladies' Benevolent Society, who, by order of a judge, represented the Society, Mrs. Susannah Bridget Knowling, a next of kin of the deceased, who, by a similar order, represented all the next of kin, and the Attorney-General.

A. Campbell and *Weigall* for the plaintiff—If the society was in existence when the testator died, and is still in existence, the society would be entitled under the will. If it had ceased to exist at the time of the testator's death the next of kin of the testator would take as on an intestacy: *Fisk* v. *The Attorney General* (*a*). If the society was in existence at the testator's death, and had

(*a*) L.R. 4 Eq. 521.

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since and before payment ceased to exist, the Attorney-General would be entitled to administer the share *cy pres*, if any general charitable purpose was intended by the testator, or, failing that, the next of kin would be entitled: *Re Slevin* (*b*).

A. Skinner and *McGuire* for the defendant Mrs. Farrington—The gift of the testator was not to a general charitable purpose, but to a particular institution, and if it failed by reason of the institution having ceased to exist, the legacy would lapse and would not be administered *cy pres*: *Re Ovey* (*c*). As between the defendants Mrs. Farrington, as representing the institution, and Mrs. Knowling, as representing the testator's next of kin, a compromise has been arrived at, subject to the approval of the Court, by which each will take a moiety of the third of residue, amounting to about 12,000*l.*, bequeathed to the Colac Ladies' Benevolent Society. If there is reasonable doubt as to which of the parties is entitled to the share, and it is shown to be for the benefit of the society, the Court will sanction such a compromise: *The Attorney-General* v. *Launderfield* (*d*); *The Attorney-General* v. *Corporation of Exeter* (*e*); *Andrew* v. *Merchant Taylors' Company* (*f*); *Attorney-General* v. *Corporation of Ludlow* (*g*). We would, therefore, ask the Court to refer the matter to the chief clerk to inquire and report whether the compromise would be for the benefit of the society, and to inquire and report who were the testator's next of kin at the time of his death.

Hayes and *Wanliss*, for the defendant Mrs. Knowling, referred to *Attorney-General* v. *Boucherett* (*h*) as to the Court sanctioning a compromise for the benefit of a charity.

Sprigg for the Attorney-General.

Cur. adv. vult.

July 18.

A'BECKETT, J. This is an originating summons to determine the application of a share in the residuary estate of the late John Haines, which he bequeathed to the Colac Ladies' Benevolent

(*b*) 1891, 1 Ch. 373; 1891, 2 Ch. 236.
(*c*) 29 Ch. D. 560.
(*d*) 3 Sw. 416 *n.*
(*e*) 2 Russ. 45.
(*f*) 7 Ves. 223.
(*g*) 6 Jur. 1003.
(*h*) 25 Beav. 116.

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Society. The difficulty which the executor has to meet is caused by doubts as to whether this society had ceased to exist at the time of the testator's death, and in order to solve it he brings before the Court, Mrs. Elizabeth Jane Farrington, who was once the secretary and treasurer of the society, Mrs. Susannah Bridget Knowling, a niece of the testator, supposed to be his only next of kin, and Her Majesty's Attorney-General. A representative order has been made, authorising Mrs. Farrington to defend on behalf of the institution. When the cause came on for hearing, counsel for the institution and for the next of kin stated that witnesses were not in attendance, as a compromise had been agreed to by the parties, which the Court would be asked to sanction. The nature of the difficulty was then stated, and authorities were cited to show that in a case like the present, where the gift of the testator was not to a general charitable object, but to a particular institution, if the gift to the institution failed by reason of the institution having ceased to exist at the time of the testator's death, the legacy would lapse and would not be administered *cy pres*: *In re Ovey Broadbent* v. *Barrow* (*i*), and cases commented on in *Slevin* v. *Hepburn* (*k*), sustain this position. Counsel for the Attorney-General did not contest it or urge that there was a gift which could be administered *cy pres* if the society was not in existence at the death of the testator. I decide that the right to this legacy lies between the institution and the next of kin of the testator. I assume that the Attorney-General will not ask for costs, and therefore that he will not attend any further proceedings in this matter. The proposed compromise is that the charity and the next of kin shall divide the legacy, and a deed has been handed in, specifying the terms agreed upon. I have been asked to refer to the chief clerk to inquire whether the proposed compromise would be for the benefit of the Colac Ladies' Benevolent Society, and it is suggested that evidence should be brought before him as to the existence and alleged ceasing to exist of the society, which, if it expired, has been resuscitated, and is now represented by Mrs. Farrington. On the affidavits before me and on the readiness of Mrs. Farrington to accept half instead of all the legacy on behalf of the society she represents, I have evidence sufficient to satisfy me that doubt exists

(*i*) 29 Ch. D. 560. (*k*) 1891, 1 Ch. 373.

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as to the society having been in existence at the testator's death. I do not see what inquiry the chief clerk could satisfactorily undertake, which would enable him to advise as to the propriety of a compromise. If evidence, in addition to that before me, as to the continuance of the society is to be given before him, that evidence may solve the doubt, and enable the chief clerk to certify either that the institution or the next of kin is entitled, and in that event the compromise could not be approved of. If the institution were found to be entitled to all it could not properly take half. The next of kin could, of course, do what she pleased with her own, but if she were found entitled she should not be required to give half to the charity. The chief clerk should not be asked to take evidence on a matter which he is not asked to decide, in order that he may say he is unable to decide it. Satisfied as I am of the *bonâ fides* of the compromise, I can sanction it without a reference to the chief clerk. In speaking of the *bonâ fides* of the compromise, I mean that there is no ground for suspecting that it has been brought about by any secret stipulation for private benefit, or that it is other than what it appears to be—a disinterested exercise of discretion on behalf of the charity. The case therefore seems to me much the same as if a doubt had arisen as to whether or not an individual to whom a legacy had been bequeathed was alive or dead at the date of a testator's death. Supposing the administrator and only next of kin of this person to be plaintiff in an action in which the person who would take the amount of the legacy if it lapsed was a defendant, there would be nothing to prevent this defendant and plaintiff compromising the action by dividing the legacy to which one or other was entitled. A similar division is provided for by the compromise now proposed, and I see no objection to the Court giving effect to it if Mrs. Knowling is, as she asserts herself to be, the sole next of kin. Upon this subject an inquiry is asked which I shall direct. The order I propose to make is as follows:—Declare that the legacy bequeathed to the Colac Ladies' Benevolent Society lapsed, if the society was not in existence at the death of the testator, and should not be administered *cy pres* for charitable purposes, and that the next of kin of the testator would be entitled thereto; that a compromise having been agreed upon by deed, dated the 23rd day of May 1892, between

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E. J. Farrington, authorised to defend this action on behalf of the Society, of the one part, and S. B. Knowling, alleging herself to be the sole next of kin of the testator, of the other part, the only enquiry now directed be that the chief clerk shall inquire who were the next of kin of the testator entitled in distribution at the date of his death. Reserve further directions and costs. Liberty to apply.

Solicitors for plaintiff: *Davies, Campbell & Davies.*
Solicitor for defendant Farrington: *Skinner.*
Solicitor for defendant Knowling: *Permezel* for *Whyte,* Geelong.
Solicitor for Attorney-General: *Guinness,* Crown Solicitor.

A. J. A.

WHITTLESEA LAND COMPANY *v.* GUTHEIL, AND GRIFFITHS *v.* WHITTLESEA LAND COMPANY.

1892
May 4, 5, 6, 9, 10.
July 18.

A'Beckett, J.

Company—Provisional directors, misrepresentation by—Prospectus, misrepresentation by—Misrepresentation—Concealment of vendor—Action by company for calls—Defence—Action by shareholder for relief—Delay—Laches—Winding up.

Misrepresentation by provisional directors advising persons to apply for shares in a company about to be formed who pose as disinterested advisers, and conceal the fact that they are the vendors of land which the company is being formed to purchase, is no answer to an action by the company for calls, nor any ground of action against the company itself, though it may be against the provisional directors deceiving them.

Misrepresentation in the prospectus of a company which did not disclose the fact that the persons therein described as provisional directors were, with one or two exceptions, vendors to the proposed company, though it might be ground for rescinding the contract of purchase, if action had been promptly taken by the company on discovering that the provisional directors were the vendors, is no ground of defence by a shareholder to an action for calls, nor any ground for claiming relief against the company.

Misrepresentations in the prospectus of a company as to the advantages and value of a property offered for sale to the company when formed, in order to form a ground of relief by shareholders, must have operated as material inducements to them to take shares, but even if material, the right to relief will be lost if their actions are not brought before the liquidation of the company, and may be lost prior to liquidation by their conduct before complaining and delay in complaining, if it has induced other innocent shareholders and creditors to alter their position.

CONSOLIDATED ACTION.

The Whittlesea Land Company brought an action against Gutheil and several other members of the company for calls due by them as shareholders, in which the defendants alleged that they

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had been induced to take shares by misrepresentations made by provisional directors of the company and misrepresentations in the prospectus of the company, and counterclaimed a return of their money paid for the shares.

Some of the shareholders also brought a separate action claiming relief on similar grounds, and these two actions were consolidated.

The facts and arguments sufficiently appear in the judgment.

Helm and *Hobday* for the company.

Neighbour and *Geoghegan* for the defendants in the first action, and the plaintiffs in the second.

Cur. adv. vult.

A'BECKETT, J. This is a consolidated action in which a company in liquidation sues several of its members for calls. The defendants say that they were induced to take shares by misrepresentation in the prospectus, and by other verbal misrepresentations, and they counterclaim the return of money paid to the company for their shares. One ground of complaint, that they had applied for a one thousand pounds share, and had been given ten shares of one hundred pounds, was abandoned at the hearing. The various misrepresentations alleged, though slightly varying as regards different defendants, may be divided into three classes. Firstly, misrepresentation by provisional directors advising them to apply for shares, posing as disinterested advisers, and concealing the fact that they were vendors to the company. Secondly, misrepresentation in the prospectus which did not disclose the fact that the persons therein described as provisional directors were, with one or two exceptions, vendors to the proposed company. Thirdly, misrepresentation in the prospectus as to the advantages and value of the property offered for sale. Dealing with the first class of misrepresentation, this if proved would not afford any defence to an action for calls by the company, or any right of action against the company. So far as I am aware, it is only in our courts that relief has been given to a person induced to become a member of a company, or of a private partnership, on the ground that he has been so induced by the advice of a person professing to be disinterested, but in truth interested, and in each case in which relief has been given it has

been as against the individual adviser, not as against the company, or the partnership whose right to hold the plaintiff to his engagements as a member of a company, or of the partnership, has been distinctly recognised: See *Ballantyne* v. *Raphael* (*a*), and *Curwen* v. *The Yan Yean Land Co.* (*b*), the first and last decided of these cases. The remedy of each of the defendants, if he has any, as to this branch of the case is against the person who deceived him, not against the company.

Coming to the second class of misrepresentation, the non-disclosure in the prospectus of the fact that the provisional directors were vendors to the company, no case has been cited in which concealment of this kind has given the right to an individual shareholder to withdraw from the company. *Askew's Case* (*c*), relied upon by the defendants, was a case of statutory fraud, depending altogether upon whether sec. 38 of 30 & 31 Vict., c. 131—not in force here—had been complied with. In *Erlanger* v. *New Sombrero Phosphate Co.* (*d*), in which the interests of the directors as vendors had been concealed, the company was suing the vendors to set aside the purchase of their property, and it was set aside on the ground that the company never had an opportunity of exercising through disinterested directors fair and independent judgment upon the subject of the purchase. There was an absence of any contracting mind operative on behalf of the company to determine whether the bargain was one which it could advantageously enter into. Those put forward as acting for the company had, as vendors, an interest adverse to the company, for whom they professed to act in completing the purchase. In the present case the price to be given for the property is set out in the prospectus, and also the fact that the vendors take half the purchase money in shares, but the mode by which the price has been fixed is not stated. Persons invited to become shareholders are not told that the provisional directors are asking the company to buy their own land at a price which they have themselves fixed, and the present case seems to be within the principle of *Erlanger's Case*; so that the company might have rescinded the contract of purchase, if it had come to the Court promptly on discovering that the provisional

(*a*) 15 V.L.R. 538.
(*b*) 17 V.L.R. 745.
(*c*) 22 W.R. 762.
(*d*) 3 App. Cas. 1218.

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directors were the vendors. But it does not follow from this that an individual shareholder can on the same ground rescind his agreement with the company. The defendants treat the prospectus as the misrepresentation, not of the promoters, but of the company. It is difficult to understand how the company can be both deceiver and deceived in this matter; how, having itself the right to rescission because the promoters have concealed their interests as vendors, the individual applicant for shares can rescind his contract with the company on the ground that the company has concealed that of which it was ignorant. But assuming that the defendants might have rescinded immediately on their discovery of the relation in which the provisional directors stood to the company as vendors, this right might be lost by delay in asserting it, or by conduct inconsistent with its subsequent assertion.

The third class of misrepresentation relied upon is of a much simpler description. The prospectus said—"The railway to Whittlesea is to be opened next January. The completion of the line will bring Whittlesea within an hour's ride of the city. The property adjoins land which has recently changed hands as high as 100*l.* per acre. Every block has extensive frontages to main Government roads." As a fact the railway was not opened until the following November, and when opened the train took more than an hour and a half to reach the city. The land spoken of as adjoining was more than a mile away from any land of the company. One block of the company's land had only one frontage to a Government road, and what was shown on the prospectus plan as a road forming its eastern boundary was in fact a river. These are the graver misrepresentations alleged; others less serious were also complained of. It is unlikely that representations such as these operated as material inducements to take shares. They were not representations which could be described, as in *Henderson* v. *Lacon* (*e*), as misrepresentations lying at the root of the contract. But taking them to be material, I have to consider the answer to the complaint now made in respect of them, which is afforded by delay in coming forward to complain and conduct before complaint. An answer which, if good as to the third class of misrepresentation, would be good as to the first and second classes. When a company

(*e*) L.R. 5 Eq. 249.

in liquidation it is too late for its members to bring an action to cape from liability on the strength of objections such as are raised ere: *Burgess's Case* (*f*). The rights of innocent shareholders d creditors have to be considered. But besides this, which may called an absolute bar after winding up has actually commenced, ere is a discretionary bar when winding up is impending, or there s been unexplained delay in proceeding: See *Tennent* v. *City Glasgow Bank* (*g*); *Heymann* v. *European Central Railway* . (*h*); *Directors, etc., of Central Railway of Venezuela* v. *isch* (*i*). The defendants first entered upon litigation after notice d been given of a meeting to pass a resolution for winding up the mpany voluntarily, but before the meeting was held at which the solution was passed. Some time before this meeting a resolution r winding up voluntarily had been passed at a preceding meeting, t it was inoperative by reason of some informality in convening e meeting. It is therefore manifest that the defendants did not me to the Court until they knew that the difficulties of the mpany had become insuperable, and that their withdrawal from e company would be injurious to their fellow shareholders and to editors. The defendants obtained their shares about August 88. They did not bring their actions to be relieved from their ares until October 1890. In the interval there had been a great cline in the value of land. Arrangements had been made with me of the vendors under which they took back part of the land ld. Other land of the company had been sold under a scheme stributing it amongst members of the company, to which several the defendants were parties. Meetings of the company were ld soon after its formation, and were attended by some of the fendants, at which the fact that the provisional directors were ndors to the company had been openly spoken of. In the con- acts with the company there was no concealment of the names of e persons interested. In the early part of 1889 Mr. Fairbrother, ne of the defendants, was in active correspondence with a view to tigation, based on the relations of the vendors to the company. ome of the defendants had been hovering about the Court for a ng time before they ventured in. That which ultimately decided

(*f*) 15 Ch. D. 507.
(*g*) L.R. 4 App. Cas. 615.
(*h*) L.R. 7 Eq. 154.
(*i*) L.R. 2 E. & I. App. 99.

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A'Beckett, J.

them to enter appears to have been the good fortune of Harper, who in an action against the company succeed cating himself on the ground that he had received ten s hundred pounds instead of one for a thousand. T defendants suffered from a similar grievance, which wa of their defences to this action, but was abandoned, waived their right to complain. Two of the defendants, and Mr. Fairbrother, consulted with Mr. Longbotto shareholder, in the early part of 1889 as to litigating i the matters now complained of. As a witness for the says:—"They wished to show me how I had good ground relief, and if I was successful they said they would try on the strength of my success. I said it would be too e me to go about this matter alone, and I wished them t me; but they would not, and so I said I would have to with the promoters and try and make the thing reduce our liabilities, and get out of it the best way Mr. Longbottom was subsequently elected a director, to carry out these objects. It would be an injustice to other shareholders in his position, if at this late stage left to discharge the liabilities of the company, and the were changed from contributories into creditors of th by the success of their counterclaims. The salient delay are the same as to all the defendants, but th applies more strongly to some than to others. As to al think that they have come at a time and under circumst should preclude them from relief. It would now be in permit them to get rid of their responsibilities as mem company. I therefore give judgment for the plaintiff, and judgment for plaintiff on counterclaim as agai defendants. In one or two instances the plaintiff' admittedly showed that the amount claimed for calls was stated in the writ; these errors will be rectified in draw judgment.

Solicitors for company: *Strongman & Crawford.*

Solicitors for defendants in first action and plaintiff action: *Tuthill, Geoghegan & Perry.*

IN RE MARTIN CLOHESSY, DECEASED.

1892
July 21.

Hodges, J.

Practice probate—Grant of administration—Letters not issued within three months—Lapse of order—Reg. Gen., 23rd June, 1873, r. 13—Subsequent grant.

Where administration of an estate has been granted and has lapsed under Reg. Gen., 23rd June 1873, r. 13, because the issue of letters of administration has not been procured within three months of the grant, letters of administration subsequently granted to a creditor need not mention the fact of the previous grant.

MOTION for administration of the estate of Martin Clohessy, deceased, to a creditor John Henry Teague, there having been a previous grant of administration to the widow, who was unable to obtain the necessary sureties.

Hayball for the motion—The previous order for administration to the widow was made on the 7th May 1891, and under the rules Reg. Gen., 23rd June 1873, r. 13, that grant has lapsed, as letters of administration were not taken out within three months of obtaining the order. The Registrar of Probates has raised the question whether administration to the present applicant should mention the previous grant.

HOLROYD, J. (after reading the rules). I do not think it necessary to mention anything about it.

Solicitors: *Smart & Walker.*

A. J. A.

IN RE WARREN & CO., EXPARTE GORDON.

F.C.

1892
June 16

Insolvency—Assignment by creditor of debt after sequestration of debtor's estate—Notice—Right to prove.

A creditor assigned his debt after the sequestration of his debtor's estate. No notice of the assignment was given either to the debtor or to his trustee in insolvency.

Held, that the creditor assignor could prove in his own name for the amount of his debt against the insolvent debtor's estate.

APPEAL from the Court of Insolvency, Melbourne.

This was an appeal by MacLachlan & Co. from an order made by the judge of the Court of Insolvency, Melbourne, upon an application made by Donald Gordon, proxy of H. Punshon & Co.,

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whereby it was ordered that the proof of debt of the said MacLachlan & Co. against the insolvent estate of Warren & Co. be rejected with costs.

It appeared that on the petition of Jacobs, Hart & Co. an order *nisi*, dated the 8th March 1892, was granted for the compulsory sequestration of the estate of Warren & Co. On the 25th March 1892 this order was made absolute. On the 2nd April 1892 MacLachlan & Co. put in their proof of debt, which amounted to 160*l.* 6*s.* 4*d.*, balance due on two promissory notes and a cheque made by the insolvents Warren & Co. On the 23rd April 1892, notice on behalf of Daniel Gordon, proxy for Punshon & Co., was given to MacLachlan & Co. of his intention to apply to the Insolvency Court that their proof of debt be rejected, expunged, or reduced, with costs against them on the grounds that no debt was due to them, that the insolvents did not make the cheque and promissory notes referred to in the proof, and that the proof and appointment of proxy were bad and illegal. At the hearing of this application before the Insolvency Court it appeared that these promissory notes and cheques had been given to MacLachlan & Co. for goods supplied by them to the insolvents, Warren & Co. It also appeared that on the 25th March 1892, the day when the order *nisi* sequestrating Warren & Co.'s estate was made absolute, the firm of MacLachlan & Co. had assigned the whole of their estate to one H. D. Hart and others. It was admitted that the debtors Warren & Co., and the assignees in their insolvency, had not received any notices from the trustees of the assignment. On these facts an order was made rejecting the proof of debt with costs, and from that order the present appeal was made on the ground that this assignment did not take away the appellant's right of proof, as it was made subsequent to the sequestration.

Weigall for the appellants—The appellants are entitled to prove their debt. It cannot be said that they are not creditors of the insolvent simply because between them and a third party there happens to be a deed of assignment. This assignment was made after the date of the insolvency, and secs. 106 and 114 of the *Insolvency Act* 1890 show that all creditors may prove, and the appellants were creditors at the time of date of the order *nisi*.

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Bryant for Gordon respondent—By this assignment the reditors assigned everything they had; the assignee should have aken proceedings in the assignor's name.

[HODGES, J. The debtor is the debtor of the assignor until otice has been given.]

HIGINBOTHAM, C.J., delivered the judgment of the Court HIGINBOTHAM, C.J., HOLROYD and HODGES, JJ.]. The statement f his reasons by the learned judge in addition to his notes of vidence in this case is not such a statement of reasons as is equired by sec. 11 of the *Insolvency Act* 1890. It merely states he decision of the learned judge. He says:—"The principal uestion before me was, Should the assignor or assignee of a debt hat had been assigned prove in insolvency?" It is greatly to be egretted that the learned judge did not give his reasons. We hink that on the facts the creditors appellant had a right to prove n this estate for the amount of these promissory notes and this heque. They were the holders of these instruments at the time f the insolvency when the order *nisi* was made. They proved on he 2nd April, but before they proved they had executed a deed of ssignment. That was done after the order *nisi* was made absolute. o notice was proved to have been given to the debtor insolvent of he assignment by these creditors or to the trustees; until notice as given to the debtor the title of the assignees of these creditors ould not be perfect. The assignees, after the execution of the eed, would, no doubt, derive an equitable title to the property ssigned to them, but for the purpose of bringing an action at law gainst the debtor, the action should be brought in the name of the ssignors, before the title of the assignees was completed by notice o the debtor. Not only was no notice given to the debtor, but no otice was given to the assignee of the insolvent estate, and in the bsence of that notice we have no doubt that the holders of these nstruments might prove in their own names, and without stating hat they proved for the benefit of their assignees. Their assignees, f they have any anxiety about their position, could take steps o secure their rights, but that is a matter for them to determine. Therefore, as no notice was given to either of the above-mentioned parties, there was nothing which prevented the present parties from

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proving for the debt, and this appeal will therefore be allowed with costs. The order rejecting the proof will be set aside, and costs, if any have been paid under the order, will be returned.

Solicitors for the appellants: *Pavey, Wilson & Cohen.*
Solicitor for the respondent: *Lewis.*

A. F. M.

F.C.
1892
August 5.

REG. *v.* ADAMS.

Criminal law—Bigamy—Evidence—Forged consent to marriage of minor—Marriage Act 1890 (*No.* 1166)—*Bonâ fide belief that forged consent to a first marriage rendered it invalid.*

On a trial for bigamy prisoner's counsel proposed to adduce evidence to show that prisoner *bonâ fide* believed that her first marriage (she then being a minor) was invalid, on the ground that the consent to her first marriage required by sec. 14 of the *Marriage Act* 1890 was a forgery.

Held, upon case stated, that the evidence was inadmissible, because, even if the prisoner *bonâ fide* believed that the consent was a forgery, the first marriage would not be invalid.

APPLICATION under sec. 485 of the *Crimes Act* 1890 for an order *nisi* calling upon Higinbotham, C.J., and the Attorney-General to show cause why a question of law which arose at the trial of the prisoner should not be reserved for the opinion of the Full Court. The prisoner Adams was placed on her trial for bigamy, she having married one O'Donnell while her first husband Adams was still living. At the time prisoner married Adams she was a minor. At the trial her counsel proposed to adduce evidence that the consent produced at the time of her first marriage (as required by sec. 14 of the *Marriage Act* 1890) was a forgery, and that the prisoner believed at the time that she entered into her second marriage that this forged consent rendered her first marriage invalid, and that she had reasonable grounds for thus believing, inasmuch as her husband had told her after the marriage that the marriage was invalid. Higinbotham, C.J., who presided at the trial, refused to admit the evidence on the ground that, even if true, it would not exonerate the prisoner. The presiding judge was requested by prisoner's counsel to state a case on the point for the opinion of the Full Court, but refused to do so, and the present order *nisi* was then applied for.

J. T. Smith in support of the application—The first marriage was invalid, because a forged consent is no consent. Sec. 14 of the *Marriage Act* 1890 provides that in the case of a minor "such marriage shall not take place unless and until there be produced to the person about to celebrate the same the written consent" of the father or guardian. The words "unless and until" are very strong, and make the marriage null and void without the consent. The word "unless" is absolutely prohibitive. Evidence that the prisoner had reasonable grounds for her belief that the first marriage was invalid should have been allowed to go to the jury.

He cited *R.* v. *Griffin* (*a*); *Gullifer* v. *Gullifer and Foley* (*b*); *R.* v. *McMahon* (*c*); *R.* v. *Tolson* (*d*).

A'BECKETT, J., delivered the judgment of the Court [A'BECKETT, HODGES and HOOD, JJ.]. This is an application for an order *nisi* calling upon the learned Chief Justice to state a case in reference to his refusal to allow certain evidence to be given upon a trial for bigamy. The evidence, as to which argument has been addressed to us, was evidence as to the forgery of the consent given to the marriage of the accused person, who was at the time of the marriage a minor, and it was proposed to show that that consent was a forgery in the first place, and that the accused person, believing that that consent was a forgery, believed at the time of the second marriage that her first marriage was invalid, and therefore that she committed no offence in entering into the second marriage. Counsel proposed, as is shown by the affidavit, to adduce evidence that the prisoner had been told by George Adams (the first husband) that the first marriage was illegal, and that she *bonâ fide* believed that it was void because of the alleged forgery and by reason of the statement of the said George Adams; and counsel also proposed to contend that the marriage of a minor without and against such consent was invalid; and that in any event the fact of the prisoner having such belief, and the reasonableness of the grounds for having such belief, were questions for the jury. The learned Chief Justice in charging the jury said: "The objection taken to the validity of the first marriage was

(*a*) 3 V.L.R. (L.) 278.
(*b*) 6 V.L.R. (I. P. & M.) 109.
(*c*) 17 V.L.R. 335.
(*d*) 16 Cox. 629; 23 Q.B.D. 168.

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not a valid objection. If the consent were a forgery affect the validity of the first marriage." The first b argument addressed to us was based on the assumpt forgery, and consequent absence of proper consent, d the validity of the marriage, and it was contended t proposed to be adduced should have been received on t of cases in English and Victorian courts, in which it w that if a prisoner have a *bonâ fide* belief, upon reasona of a fact which would have rendered her first marriage was a permissible subject for the consideration of a j evidence proper to be submitted to a jury, upon which believed in the prisoner's *bonâ fide* belief in the exis fact, they would be justified in finding the prisoner there was no *mens rea* in the prisoner. In those cases which the belief of the accused rested, and as to which allowed to be given, was one which would have rende marriage invalid. The difference between those ca present case is that the existence of the fact alleged believed—namely, the forgery of the consent,—wou rendered the first marriage invalid, as it was belief of fact. A person will not be permitted to say that he o know the law—that is not a matter proper to be subm jury; and the cases referred to by counsel are not a justify the admission of evidence of a fact which is ir

The second branch of the argument was that the fo consent rendered the marriage invalid. If we agre contention, we should think that evidence as to t belief would have been improperly excluded, but on co provisions of the *Marriage Act* as to consent, and con with other sections in the Act, we have no doubt marriage was valid, even though the consent was therefore refuse this application.

Solicitors for prisoner: *Gaunson & Wallace.*

IN RE ALFRED STILLINGFLEET WHITE, DECEASED.

1892
Sept. 7, 9.

Hood, J.

Practice probate—Order nisi—Discovery of documents.

The Court will not order discovery of documents, pending the hearing of an *nisi* for administration, where the application is made *exparte*.

APPLICATION for discovery of documents.

An order *nisi* had been made calling on the executor of an eged will of Alfred Stillingfleet White, deceased, to show cause y administration of his estate should not be granted to the licant, the widow. The order *nisi* was in the list for trial, and lication was now made *exparte* to the judge sitting in the ctice Court for an order for discovery of documents.

Agg in support of the application—The order *nisi* is in the list trial, and according to the *Administration and Probate Act* 1890 . 1060) is to be heard, as nearly as may be, in the same way as a l at law. At law the plaintiff would be entitled to discovery, under der XXXI., r. 12, of the Judicature Rules. If, however, by tue of Order LXVIII., r. 1, the Judicature Rules are excluded, n the Probate Rules (Reg. Gen., 23rd June 1873) would apply. express provision is made in them for discovery, but by rule 18 lications for probate or administration, under peculiar circum- nces not referred to therein, shall be made upon such grounds l materials, as to real and personal property, as had been thereto- e acted upon by the Court in its ecclesiastical jurisdiction, or as ar thereto as circumstances permit. Under the ecclesiastical isdiction, prior to those rules, there was power to grant dis- very: *Harvey v. Lovekin* (*a*); *Euston* v. *Smith* (*b*). In *Re shop* (*c*), Molesworth, J., had given leave to deliver interrogatories the examination of an executor out of the jurisdiction, whose orney under power was applying to have the seal of the Supreme urt attached to the probate granted in Ireland, and this order s upset on the ground that the executor was not a party to the plication to have the seal attached. If there had been no power any case to administer interrogatories, it would have been fficient to say so.

Cur. adv. vult.

(*a*) 10 P.D., p. 127. (*b*) 9 P.D. 57. (*c*) 17 V.L.R. 4.

1892
Sept 9.

In re
WHITE.

Hood, J.

HOOD, J. Mr. Agg, I have been looking into that *Re White*, and it seems to me that I cannot grant the *exparte*. If you look at a passage in *Bray on Discovery* cl. iii.) you will find that is so, and indeed it seems to b whether it should not be by order *nisi*: See L.R. 1 P. &

[*Agg*—The case is in the list for trial, and the time to apply in that way.]

I cannot, at all events, grant the application *exparte*.

Solicitor: *C. M. Watson.*

1892
Sept. 12.

Hood, J.

[IN CHAMBERS.]

IN RE ——— (*a*).

***Insolvency—Practice—The Insolvency Act* 1890 (*No.* 1102), *s.* 37, *sub-s.* *within which petition should be presented—Computation of time—the Insolvency Act* 1890, *r.* 4.**

Rule 4 of the rules under the *Insolvency Act* 1890 only applies to the of time in cases where such time is prescribed by the rules, or by the pr Court, and not to cases where the time is fixed by the Act itself.

By sec. 37, sub-sec. (v.), it is provided that a petition for sequestrati section must be presented within twelve days from the seizure. Th made on 30th August, and the petition was presented on Monday, 12th

Held, that the petition was not presented within the time limite sub-sec. (v).

A PETITION was presented by ———, the judgment c the compulsory sequestration of the estate of ———.

The ground upon which the petition was presented execution had issued against the debtor, and remained u It appeared that seizure had been made on the 30th Au The petition was presented on Monday, 12th September.

P. D. Phillips in support of the application.

[HOOD, J. Is not this application too late? By se sec. (v.), the petition for sequestration must be presen twelve days from the seizure.]

By rule 4 of the rules under the *Insolvency Act* provided that "in all cases in which any particular numb not expressed to be clear days, is prescribed by these r

(*a*) The name of the judgment debtor has not been furnishe

1892

In re ——

Hood, J.

ıe practice of the Court, the same shall be reckoned exclusively of ıe first day and inclusively of the last day, unless the last day ıall fall on a Sunday or holiday, in which case the time shall be ckoned exclusively of that day also."

[HOOD, J. That rule does not help you, inasmuch as the time prescribed by the Act, and not by the rules or practice.]

Sec. 12 of the *Insolvency Act* provides that—"So far as rules not extend, the principles, practice, and rules on which the ıpreme Court has heretofore acted in dealing with insolvency oceedings shall be observed." Where the last day for performing act falls on a Sunday, the general rule as to the practice is not count the Sunday. The rules themselves being otherwise silent, e Court can make the order in accordance with the practice: *In re ısp* (*b*).

HOOD, J. The Act requires that the petition should be pre- ıted *within* twelve days after seizure. This petition was not esented within that time, and the only argument in support of e application is that as the last day for presentation fell on a ınday, the Sunday should not be counted in the computation of e twelve days. Rule 4 of the Insolvency Rules does not apply this case, because it only applies where the days are prescribed the rules or the practice of the Court, and here the days are escribed by the Act itself. No assistance can be obtained from c. 12, because if these rules do not extend I do not know of any actice on which the Supreme Court has heretofore proceeded in solvency proceedings which would justify me in acting as requested this applicant. The rules of the Supreme Court certainly do t apply. I refuse to accept the petition.

Solicitors for applicant: *Fink, Best & P. D. Phillips.*

W. H. M.

(*b*) 5 V.L.R. (I.) 1.

1892
Sept. 8, 19.

A'Beckett, J.

TRUSTEES, EXECUTORS, AND AGENCY COMPANY *v.* McDONALD AND OTHERS.

Will—Construction—Gift to individuals or a class.

A testator devised his residuary estate to trustees upon trust to divide the same equally between A and B, his brothers; C, his sister; and the children of A by his first wife; so that each of his brothers, his sister, and the children of A should take an equal share of the residuary estate.

A died in the testator's lifetime.

Held, that this was a gift to a class, and not to individuals, and that there was no intestacy as to A's share, but that it was divisible among the other residuary legatees.

In re Chaplin's Trusts (33 L.J. Ch. 183) dissented from.

ORIGINATING SUMMONS referred into Court.

Probate was granted to the plaintiffs executors on the 19th December 1889. The material part of the will was as follows:—

"And I direct my trustees to stand possessed of all the moneys to arise from the sale of my real and personal estate as aforesaid, and of the ready moneys belonging to me at my decease, upon trust, to divide the same equally between the following persons, that is to say:—My brother John McDonald, my brother Robert McDonald, my sister Margaret McDonald, and the children of my said brother John McDonald by his marriage with his first wife (formerly Mary Cameron), so that each of my said brothers, my said sister, and each of the said children of the said John McDonald by his said first wife shall take an equal full share of my trust property. And I declare that if"

The will ended here suddenly. The testator left him surviving his brother Robert, his sister Margaret; Ann McGillivray and Mary Clark, daughters of John McDonald by his first wife; Donald McDonald, Alexander McDonald, and Catherine McDonald, children of John McDonald by his second wife; and Catherine Denison, a daughter of another sister of the testator who predeceased him. John McDonald, the testator's brother, died in the testator's lifetime.

The questions submitted by the summons for the determination of the Court were—1. Is the part of the will of the said Alexander McDonald admitted to probate valid as regards his dispositions of the estate thereby intended to be effected? 2. Who are entitled to the portion of his estate which his brother John would have taken had he survived the said Alexander McDonald, and in what proportions are they entitled thereto?

Wanliss for the plaintiffs.

Morrison for the children of John McDonald by his second wife nd Catherine Denison, the daughter of a sister of testator's who redeceased him—The gift in the will is a gift to individuals, and ot to a class, because John McDonald is named in the will. The estator has died intestate as to John McDonald's share, and his ext of kin take it.

He cited *In re Chaplin's Trusts* (*a*); *In re Smith's Trusts* (*b*); *n re Jackson* (*c*); *Bain* v. *Lescher* (*d*).

Guest for the residuary legatees named in the will—This is a ift to a class, and the survivors of it take the share of any member ho predeceases the testator. The inclusion of the "children" of ohn introduces an element of uncertainty as to the number of the eneficiaries, and thus the gift cannot be one to individuals.

He cited *Porter* v. *Fox* (*e*); *Re Stanhope's Trusts* (*f*); *Knapping* v. *Tomlinson* (*g*); *Aspinwall* v. *Duckworth* (*h*); *Re Ann Wood's Will* (*i*).

Cur. adv. vult.

A'BECKETT, J. (after stating the facts, continued—). The first uestion is as to the effect of the final words, "And I declare that ." I regard them as of no effect. There is nothing to show what he testator intended to say by the sentence which begins with these ords, and breaks off suddenly. He has said nothing which can ffect the preceding dispositions.

The second question relates to a difficulty caused by the death n the lifetime of the testator of his brother John McDonald. Does his share lapse and go to the testator's next of kin as on an ntestacy, or is it divisible among the other residuary legatees? On their behalf it is contended that, inasmuch as the children of ohn McDonald by his marriage with his first wife are included in his gift, an element of uncertainty as to the amount of the several hares of the residuary legatees is introduced which excludes lapse.

(*a*) 33 L.J. Ch. 183.
(*b*) 9 Ch. D. 117.
(*c*) 25 Ch. D, 162.
(*d*) 11 Sim. 397.
(*e*) 6 Sim. 485.
(*f*) 27 Beav. 201.
(*g*) 34 L.J. Ch. 7.
(*h*) 35 Beav. 307.
(*i*) 31 Beav. 323.

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TRUSTEES, EXECUTORS, AND AGENCY CO. v. MCDONALD.

A'Beckett, J.

It is said that if one of these children had died in the lifetime of the testator the shares of all the other residuary legatees would have been augmented by the reduction in the number of persons entitled to share in the common fund; that the residue is not given in specific shares to the several legatees, so that on the death of anyone in the testator's lifetime his share lapses, but is given as a whole to be equally divided between those who by surviving the testator are able to take. In other words, that the residue is given to a class within the meaning of that expression as defined in *Jarman on Wills* (4th ed.), Vol. I., p. 269: "In legal language the question whether a gift is to a class depends upon whether an aggregate sum is given to a body of persons uncertain at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportion, the share of each being dependent for its amount upon the ultimate number of persons. If any of the class take, they take the whole, so that the subject of the gift can never be partly disposed of and partly undisposed of." It is further pointed out that to constitute a class in this sense the persons named need stand in no special relation to the testator, or to one another, and that some of them may be named persons, as in a gift to A and B and the children of C, A, B and C being unrelated to the testator or to one another. The authorities referred to as supporting this proposition in *Jarman* are conflicting, and are commented on as such in the note. The case which comes nearest to the present is *Re Chaplin's Trusts* (*k*). In that case, Vice-Chancellor Page Wood is reported to have said that he did not think the case would admit of argument, and he held that there was no gift to a class, and that the share lapsed. Declining to follow that case, I hold the gift here to be to a class, and that there is no lapse. I feel myself justified in differing from so eminent a judge by the observations made upon his decision by another judge, and by the ground of his decision being at variance with the law as laid down in several other decisions. He says: "The meaning of a gift to a class is a gift to a set of persons in respect of fulfilling some definite condition, as for instance a gift to the children of B." This definition is opposed to authority. In *Porter* v. *Fox* (*l*) the class was made up of a named nephew and grandchildren. In *Re*

(*k*) 33 L.J. Ch. 183. (*l*) 6 Sim. 485.

Stanhope's Trusts (*m*) it was said: "A person may make a bequest to a class, as to the daughters of A and the daughters of B, and he may add any person to them, making together one class": See also the observations of Kindersley, V.C., in *Knapping* v. *Tomlinson* (*n*). In *Shiers* v. *Ashworth* (*o*), Chitty, J., says: "Sir William Page Wood, in *Re Chaplin's Trusts*, in substance referred to a class by what may be called the more or less scientific definition, that is to say, not the definition which is usually adopted in the cases at law upon the subject." I think that in the case before me the inclusion of the children of John McDonald introduces the element of uncertainty, which excludes lapse. If a child had died, the named residuary legatees would have received a larger share, so as a named residuary legatee has died the children in common with the other residuary legatees should receive a larger share. This view commends itself to me, not only as warranted by authority, but as excluding the operation of the well-settled rule which I think opposed to the intention of a testator. If he gives all his property to A, B and C in equal shares, this rule treats him as giving a third to each, so that if one dies in his lifetime there is an intestacy as to this third. The probable intention is not to restrict each to a third, but to give the whole to three, or to such of the three as may live to take it, in equal shares, if more than one.

DECLARE that the will of the testator is to be construed as if the final words "And I declare that if," had been omitted therefrom. Declare that the death of John McDonald in the lifetime of the testator caused no lapse, and that the testator's residuary estate is divisible amongst the other residuary legatees, as if the said John McDonald had not been named as one of such legatees. Refer to tax the costs of all parties to this summons; the plaintiffs' costs as between solicitor and client. Direct that plaintiff retain its own costs and pay costs of other parties out of the residuary estate.

Solicitors for plaintiffs: *C. Marriott Watson*, for *Pearson & Mann*.

Solicitors for defendants: *Plummer*, for *S. F. Mann*; *Blake & Riggall*.

A. F. M.

(*m*) 27 Beav. 201. (*n*) 34 L.J. Ch. 7. (*o*) 25 Ch. D., at p. 165.

1892
Sept. 27.

Hood, J.

[IN CHAMBERS.]

NOALL *v.* BILLING.

Practice—"Rules of the Supreme Court 1884"—*Order III., r.* 6—*Order XIV., r.* 1—*Order XIX., r.* 4—*Specially indorsed plaintiff—Signature—Amendment.*

A judge has power to amend irregularities in a specially ind there is nothing wrong with the special indorsement itself.

Where a specially indorsed writ does not set out the plaintiff's this may be amended, as it is not part of the special indorseme irregularity.

A specially indorsed writ containing the printed name of the pl at the foot of the claim is sufficiently signed within the meaning of

THIS was an application under Order XIV., r. 1 the plaintiff, for leave to sign final judgment.

The writ at the end of the claim contained the na of solicitors, by whom it purported to have been s name was printed and not written. The plaintiff's a writ was given as his place of business, and the not stated.

Beckett to oppose—There are two objections to th residence of the plaintiff is not given, and this has b be essential: *Stoy* v. *Rees* (*a*).

[HOOD, J. That may be amended. It is not an of the special indorsement.]

The other objection is that the writ is not sig does not contain the word "signed," as is provide given in the Appendix, and the firm of solicitors d It is merely printed, and a printed form like this do with the rule that a statement of claim shall be " *Queen* v. *Cowper* (*b*).

Cussen in support of the application—No doub residence should be given, but that is a matter o *Gurney* v. *Small* (*c*) decides that where a special i wrong it cannot be amended, but that decision does

(*a*) 24 Q.B.D. 748. (*b*) 24 Q.B.D. 60, 533. (*c*) 1

1892

NOALL v. BILLING.

Hood, J.

mere informality like this. In the case of *The Queen* v. *Cowper* (*d*) the judges were divided in opinion. Lord Esher, M.R., thought that a lithographed signature was sufficient. It is merely a matter of practice. Counsel never sign the pleadings that are delivered and filed; they sign the draft only, which is never seen by the other side. By sec. 11 of the *Acts Interpretation Act* 1890, expressions relating to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, and other modes of representing words in a visible form. The printed name of the firm is sufficient proof of authenticity.

HOOD, J. As to the first objection to this writ, assuming it to be a good objection, it can be cured by amendment. I am of opinion that a specially indorsed writ can be amended on these applications, except in the specially indorsed portion. If the rule requiring the address of the plaintiff to be given has not been complied with, the writ is still a good writ. Order LXX., r. 1, enables the judge to amend irregularities, and as there is nothing the matter with the special indorsement I will allow the writ to be amended by inserting the correct address of the plaintiff.

The second objection is that at the foot of the statement of claim the name of the solicitor was printed, and it was urged that that was not a signature in compliance with Order XIX., r. 4. I am satisfied that it was placed there as, and intended for, a signature. The case of *The Queen* v. *Cowper*, relied upon by the defendant, decides that under an English County Court rule of somewhat similar effect, a lithographed signature was not sufficient. That decision has recently been qualified to a slight extent by *France* v. *Dutton* (*e*); but if I had to face the decision itself I would agree with the remarks of Lord Esher, M.R., the dissenting judge. But I think that that decision is distinguishable from the present. The Court there decided that the English County Court rule required the guarantee of the solicitor himself, owing to the nature of the instrument to be signed, but Order XIX., r. 4, requires a signature to pleading merely, I think, for taxation purposes, so as to enable the taxing officer to

(*d*) 24 Q.B.D. 533.

(*e*) [1891] 2 Q.B. 208.

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decide whether fees for counsel or solicitor, in connec
drawing of the pleading, should be allowed, and the s
well be printed. I overrule the objections, and I r
where I think there is no defence my views are stron
endeavour should be used to overrule technicalities on
tions as these. On the facts, however, I think th
should have leave to defend. Summons will be dismi

Solicitors for plaintiff: *Attenborough, Nunn & Sm*
Solicitors for defendant: *Abbot, Eales & Beckett.*

1892
Sept. 30.
Hood, J.

[IN CHAMBERS.]

HOWARD AND OTHERS *v.* JONES.

Practice—"Rules of the Supreme Court 1884*"—Order XXXVIII Court Act* 1890 (*No.* 1142), *s.* 90—*Affidavit sworn in New Sou missioner for taking affidavits out of Victoria—Evidence of a*

An affidavit, purporting to be sworn out of Victoria before a c taking affidavits in New South Wales, cannot be read in proceedi unless there is some evidence to show that the person before wh purports to be sworn is authorised to administer oaths in New South

THIS was an application on behalf of the plaintif judgment which had been signed in this action, and to person as co-defendant on the record. An objection behalf of the proposed co-defendant that the affidavit used by the plaintiffs in support of the application pur sworn before a person describing himself therein as sioner of the Supreme Court of the colony of New for taking affidavits," and not before a commissioner of Court of Victoria.

Box in support of the summons.

Isaacs to oppose.

Cur.

HOOD, J. An affidavit sought to be used in purported on its face to have been sworn before a appointed by the Supreme Court of New South Wa

affidavits in that colony. Mr. Isaacs objected to this affidavit being used, inasmuch as it did not appear that the person before whom the affidavit was sworn was lawfully authorised to administer oaths in New South Wales. Reliance was placed in support of the affidavit upon Order XXXVIII., r. 6, and sec. 90 of the *Supreme Court Act* 1890. The rule, which is in the same words as the section of the Statute, provides that in matters pending in this Court affidavits may be sworn in any colony under the dominion of Her Majesty, before any person lawfully authorised to administer oaths in that colony. Stopping there for a moment, this affidavit is in form in every respect, and can be used in evidence in this colony, if the person before whom it was sworn is a commissioner authorised to administer oaths in the colony of New South Wales. If the rule went no further, such an affidavit would be admissible in evidence in proof that it was sworn before a person duly authorised to take oaths, and that the signature to the affidavit purporting to be the commissioner's was really the signature of that person. The rule, however, goes on to provide that the judges and the other officers of our Court shall take judicial notice of the signature of any person so authorised, saying nothing as to the recognition of the position of the alleged commissioner, and therefore I think some evidence should be presented to show that the person purporting to sign was in fact authorised to administer oaths in the colony of New South Wales. As there is no such evidence furnished in the present case, the affidavit cannot be read.

Solicitors for plaintiffs: *Moule & Seddon.*
Solicitors for defendant: *Pavey, Wilson & Cohen.*

A. F. M.

1892
Oct. 18, 24.

A'Beckett, J.

[IN CHAMBERS.]

THE PENINSULAR AND ORIENTAL S.N. CO. *v.* BRITNEL

Practice—Pleading—Inconsistent counterclaim.

The plaintiff sued the defendant for breach of an agreement. T
his defence denied that he was a party to the agreement, and then in
alleged that if he was a party to the agreement, which he denied, t
breach of such agreement by the plaintiff, and he claimed damages f

Held, that the counterclaim was not inconsistent, and should not
embarrassing.

THIS was an application on behalf of the plaintiff
the counterclaim of the defendant Scudds, on the g
was embarrassing, and tended to prejudice the fai
action. The nature of the claim, and the form of
claim, fully appear in the judgment.

Bayles in support of the application.

Fink to oppose.

Cur

A'BECKETT, J. The plaintiff sues for breach of
writing for washing linen for the company, which
statement of claim alleges was entered into on b
defendant Scudds and another, as executors of one Mr
it alleges that they have in fact carried on the contract
benefits and payments in respect thereof. The defen
by his defence, denies these allegations, and avers tha
either expressly or by implication, enter into the agr
counterclaim he says "that if he was a party to the
(which he denies), "then by the terms of the said a
plaintiff agreed with the defendants that defendants
all the linen of the plaintiff company landed at
Melbourne, at the price or rates therein set out, and
company landed large quantities of linen at the s
refused to allow the defendants to wash a portion
whereby the defendants lost large profits which they
wise have made under the said contract," and he

damages. The plaintiff took out a summons to strike out this paragraph in the counterclaim on the ground that it tends to prejudice or embarrass the fair trial of the action.

The counterclaim is not open to objection on the ground of inconsistency: *Owen* v. *Morrison* (*a*). It is, however, contended that, inasmuch as the defendant may proceed with his counterclaim, though the plaintiff may abandon his claim, the counterclaim should be complete in itself, and show in itself a good cause of action. Applying this standard, the counterclaim fails to come up to it. Taken alone, and as the starting point of a proceeding against the present plaintiff, it would not disclose any ground of action. By his counterclaim the defendant says: "I am not a party to an agreement which you have entered into, but if I should, contrary to my assertion, be held to be a party, you have broken the terms of the agreement, and I claim damages for its breach." A statement of claim in these terms would be struck out. It would be embarrassing, if not unintelligible; but the counterclaim taken in connection with the statement of claim is not open to either objection. Although the counterclaim might, so to speak, be cut adrift by the abandonment of the claim, it is at present fastened to the claim, which supports it by justifying its form. It does not lie in the mouth of the plaintiff to say, for the purpose of the present argument, that the claim has no substance, and that the allegation that the defendant was a party to the agreement is an assertion which cannot be supported. If the plaintiff supports it, the defendant's position under the counterclaim is simple enough. He claims damages for breach by the plaintiff of an agreement with him, on which he is sued by the plaintiff. I think the defendant is not obliged to admit that he is a party to the agreement for the purpose of asserting a contingent right to damages founded on the agreement. To put a case almost identical with the present: Suppose a plaintiff to sue on an agreement entered into on behalf of the defendant by an attorney under power. The defendant denies that the terms of the power authorised the attorney to bind him by the agreement, and says he is not bound by it; but by counterclaim he says, if I am bound by the agreement, the provisions in my favour have not been performed by the plaintiff,

(*a*) 35 Ch. D. 492.

1892

THE PENINSULAR AND ORIENTAL S.N. Co. v. BRITNELL.

A'Beckett, J.

and I sue for damages for their breach. Why should
permitted to raise the question of construction on the te
power, and also to claim such relief as he would be en
his construction were incorrect. The plaintiff's claim ag
and his against the plaintiff, are closely connected, and h
be permitted to have both claims disposed of at the same
the plaintiff here should fail on the claim, the defend
necessarily fail on his counterclaim, which might be dism
costs. He takes that risk. So also, if the action of th
were stayed, discontinued, or dismissed, the defendant
properly proceed with his counterclaim under Order X
and I think the plaintiff might then successfully apply t
counterclaim struck out. But I have not to dispo
summons with reference to circumstances which mig
hereafter, but with reference to the pleadings as they
The plaintiff now says that the defendant is a party to
ment, and I think the defendant may now by counterclai
do not admit that I am a party, but if I am, I claim d
your breach of the agreement."

Summons dis

Solicitors for plaintiff: *Malleson, England & Stewar*
Solicitors for defendant Scudds: *Gaunson & Wallace*

[IN CHAMBERS.]

ASKEW *v.* SYME.

1892
Oct. 25, 31.

A'Beckett, J.

Rules of the Supreme Court 1884"—Order XXXVI., rr. 5 and 6—Application to have case tried by jury.

The plaintiff, who was an architect, sued the defendant for his commission on a building contract. The defendant counterclaimed for negligence, involving a number of specified items of omission and defects in the contract work, improper allowances to contractor for raising the building, and damages to the building by settlement and improper foundation. The plaintiff obtained an order *exparte* for the trial of the action with a jury.

Held, upon an application by the defendant to set aside the order, and to have the action tried before a judge without a jury, that the action came within the terms of Order XXXVI., r. 5, and involved matters requiring a scientific and local investigation, and could not be conveniently tried with a jury.

An order obtained *exparte* for the trial of an action with a jury is no bar to an application to have the action tried before a judge without a jury.

THIS was an application on behalf of the defendant to set aside an order for the trial of the action before a jury, obtained by the plaintiff *exparte*. The nature of the action is set out in the judgment.

Box in support of the application.

Isaacs to oppose.

Cur. adv. vult.

A'BECKETT, J. In this case I made an *exparte* order for trial by a jury on the application of the plaintiff, who applied in due time. The defendant now moves to set aside this order, and for an order directing trial without a jury under rule 5 of Order XXXVI. I do not regard my *exparte* order as a bar to directing trial without a jury in a proper case for it. In his observations on the rules on this subject in *Butters* v. *Durham Gold Mining Company* (*a*), Holroyd, J., says: "I can see no reason why, even after an order has been made for a trial with a jury under rule 6, the Court or a judge may not, upon the application of any other party, exercise the power conferred by rule 4 or rule 5, if convinced

(*a*) 11 V.L.R., p. 375.

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that the discretion exists in the particular case." Th
this case is an architect, suing for his commission
contract for a house at St. Kilda, and the defendant, t
counterclaims for negligence by the plaintiff in vario
a number of specified items of omission and defects ir
work, improper allowances for raising the building, an
the building by settlement and improper foundation
that the case requires scientific and local investig
cannot conveniently be made with a jury. I have n
the case would be more conveniently and expeditiousl
judge without a jury, and with less chance of misca
doubt whether the rule contemplated an action of this k
as to scientific investigation only the ordinary diffic
case in which a jury has to decide upon expert evide
vations as to the cases to which the rule applies
Jenkins v. *Bushby* (*b*), in which Lord Justice Lindle
merely preserves the old practice of the common la
the matter were *res integra* in our Court, I should h
rule did not apply, but I find that other judges have
cases to fall within the rule, and it is undesirable to
interpretations. The more beneficial interpretation
such cases. Inconvenience might arise if more than
view became necessary, and a jury had to make local
so that I feel warranted in making the order which I c
conducive to a satisfactory determination of the case.
my former order, and direct that the case be tried
without a jury. Costs of former order to be plaintiff'
cause, and the costs of this summons to be plaintiff
dant's costs in the cause.

Solicitors for plaintiff: *Westley & Dale.*
Solicitors for defendant: *Smith, Emmerton & Joh*

(*b*) [1891] 1 Ch., p. 484.

HAINES *v.* THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.

F.C.

1892

August 12.

Health Act* 1890, *No.* 1098, *sec.* 234—*Notice to form streets, form of—Plans and specifications, inspection of—Power of justices to question witnesses after close of case.

The word "premises" in sec. 234 of Act No. 1098 includes any narrow strip of ground which abuts upon a street.

Although a notice given under sec. 234 of Act No. 1098 does not specify the manner and levels and specifications in and under which the work is to be carried out, yet the notice will be good if it contains an intimation that the levels and specifications according to which the work is to be done are open for the inspection and perusal of the owners at the municipal hall at all days and at all hours fixed for the municipal hall to be open.

A notice under sec. 234 of Act No. 1098 may be addressed to all the respective owners of premises abutting the street, requiring them to form, etc., the street, without specifying what particular part of the work each owner is to do.

Justices have power at the close of the whole case, and before delivering their decision, to ask any question of a witness which either the prosecution or defence might legitimately have asked.

THIS was an order *nisi* to review the decision of the justices in petty sessions at Hawthorn. In this case Charles Haines, the secretary of the Shire of Boroondara, proceeded against The Trustees Executors and Agency Company Limited, the executors, to whom probate was granted, of the will of Ernest Carter, deceased, for having neglected to comply with a notice served upon them in pursuance of sec. 234 of the *Health Act* 1890. The justices convicted the defendants, and fined them 10*l.* 7*s.*, with 2*l.* 2*s.* costs, and in default ordered distress. The defendants then obtained an order *nisi* to review this decision on the following grounds:—

1. That there was no evidence adduced to show, by resolution of the council or otherwise, that the street was not formed, etc., to the satisfaction of the council.

2. That there was no evidence adduced to show that the respective owners of premises fronting, abutting, and adjoining Daphne Street had been duly served with notice to form, etc., the street.

3. That sec. 234 of the *Health Act* 1890 does not apply to reserves or strips of land like the land of defendants' in question.

4. That the notice is bad, as it does not specify the manner, levels, and specifications in which the work is to be carried on.

5. That the defendants could not do the work without trespassing on other people's rights.

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6. That the notice is bad in that it does not specif
of the work the defendants are to do, but requires them
whole of it.

On the hearing of the motion that the order be ma
grounds one and five were not argued.

It appeared that the defendants were the owners of a
strip of land five feet in width, fronting on a certain
on private property, known as Daphne Street, Balw
28th October 1891, they were served with the follo
under sec. 234 of the *Health Act* 1890:—

The Health Act 1890.

SHIRE OF BOROONDARA.

NOTICE.

Whereas a certain road set out on private property within the Shire
and called or known as Daphne Street, is not paved, levelled, or drain
faction of the council of the said shire, the council of the said shire
this notice require you the respective owners of the premises fronting
abutting upon the said road within twenty-eight days from the servic
to form, pave, level, drain, and make good the same in the manner a
levels and specifications approved by the said council, which levels a
are open for your inspection and perusal at the office of the said cou
hall, Camberwell Road, Camberwell, on all the days and between
municipal offices are appointed to be open. If this notice be not com
will each be liable to a penalty not exceeding 10*l.* for each day du
notice is not complied with, and the said council may, if it think fit,
or in lieu of prosecuting for such non-compliance, execute the work
referred to herein, and may recover from the owners in default the ex
by it in so doing in such proportions as may be fixed by the said coun
is declared to be of limited and individual application.

Dated this 12th day of October 1891.

The common seal of the municipal council of the Shire of Boroondara was affixed hereto by the order of the council by } THOMAS WARDIN
C. HAINES, Shire

To the respective owners of the premises fronting, adjoining, or abutting upon Daphne Street, within the Shire of Boroondara, and to Trustees Executors and Agency Company Limited, as executors of the will of Ernest Carter, one of the said owners

SEAL.

The defendant company neglected to comply with
and on the 14th June 1892 the secretary of the Shir
dara laid an information against the company for s
The summons came on for hearing on the 21st June
the court of petty sessions at Hawthorn. Amongst oth

ken by the attorney for the defendants for the defence, it was jected that there was no evidence that the respective owners premises fronting, adjoining, and abutting on Daphne Street d been duly served with notice to form, etc., the street, and the nch, after the close of the case for the defendants, while consider- their judgment, asked whether, as a matter of fact, notice had en served on all the owners in addition to the defendant, when e of the witnesses for the prosecution stated that such owners had en served with notices, and had all paid their respective propor- ns. The Bench then delivered their decision, and convicted the fendants as above stated.

Bryant moved the rule absolute.

Madden and *Robinson* showed cause.

HIGINBOTHAM, C.J., delivered the judgment of the Court [IGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. This is an order si obtained on six grounds. Only four of those grounds have en argued, and we think that on each of those four grounds the pellant has failed. The grounds argued were the second, third, urth, and sixth. The second ground is as follows:—"That ere was no evidence adduced to show that the respective owners premises fronting, abutting, or adjoining Daphne Street had en duly served with notices to form, etc., Daphne Street." Now, appears that after the justices had retired to consider their cision, but before announcing the same, they asked the question nether, as a matter of fact, notice had been served on all owners addition to the defendants, and the answer given by one of the tnesses for the prosecution was to the effect that notice had been ven to the respective owners, and that they had all, with the ception of the defendants, paid the amounts due from them. It now said that the justices had no right to put that question. e think that they had, on the same principle that a jury may, ith the leave of the Court, ask any question which either the osecution or the defence might legitimately have asked.

The third ground is:—"That sec. 234 of the *Health Act* 1890 does ot apply to reserves or strips of land like the land of the defendants

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in question." It appears that on the side of Daphne Str
this work was to be carried out there was a reserve of
width owned by the defendants, who were also the owne
Street itself, and it was contended that because this s
Daphne Street was so small (five feet in width) the owne
not be called upon to contribute their share. That ar
based upon the meaning to be given to the word "p
sec. 234 of the *Health Act* 1890. The word "premise
somewhat uncertain meaning, but there is nothing in
either to show that it would not be proper to includ
meaning of the word "premises" a strip of ground, th
to five feet in width, abutting upon a street, or to show
of land of that size would be exempt under the section.
opinion that the section does apply to such a piece of l

The fourth and sixth grounds of the order *nisi* wer
gether. The fourth ground is:—"That the notice is ba
not specify the manner, levels, and specifications in wh
is to be carried on." True, the notice does not specify
in which the levels and specifications are to be carried
contains an intimation that the levels and specificatio
to which the work was to be done were open for the in
perusal of the defendants at the municipal hall, on all
all hours fixed for the municipal hall to be open, whi
hours are fixed by regulations made under Act of
That, in our opinion, was a sufficient intimation to the
and it was their duty to go to the shire hall and obta
mation which this notice intimated was there procu
sixth ground is:—"That the notice is bad, inasmuc
not specify what part of the work the defendants ar
requires them to do the whole of it." This, I think,
question upon which any doubt in this case appea
Sec. 234 of the *Health Act* 1890 provides that in cas
etc., is not formed, etc., to the satisfaction of the counc

"The said council may from time to time, by notice to the respe
the premises fronting, adjoining, or abutting upon such parts the
required to be formed, paved, levelled, drained, or made good, requir
pave, level, drain, or make good the same in such manner and accordi
and specifications as may be approved by the said council, and with
named in such notice; and if such notice is not complied with, the

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ch notice has been given shall each be liable to a penalty not exceeding 10*l.* for ch day during which such notice is not complied with, and the said council may, if ey think fit, subsequently to or in lieu of prosecuting for such non-compliance, ecute the works mentioned or referred to therein, and the expenses incurred by em in so doing shall be paid by the owners in default in such proportions as may be ed by the said council, and shall be recoverable as hereinafter provided."

uestions have frequently arisen as to the proper form of notice ider this section. It seems to us that the notice in this case is in e proper form, and carries out the real intention of the Act. It a notice addressed to the respective owners of premises fronting aphne Street. It is also addressed to the Trustees Executors d Agency Company, that is, to the individual owner to whom it s delivered. It is a notice to all the owners respectively and to e individual owner, and calls upon all the owners to do this rk. It is not intended to cast upon the one owner to whom it s delivered the obligation of doing the whole of the work, which ght to be done by all, but it is a notice to all the owners of the rk that has to be done by all, or, if not done, that the council y do it and charge the owners with the costs. We think that is is a proper notice, and that its form is correct. The order *nisi* ll be discharged with costs.

Solicitors for the defendants appellant: *Gillott, Croker & owden.*

Solicitor for the complainant respondent: *Atkyns.*

W. H. M.

IN RE PHILIP FALK.

F.C.
1892
June 9, 10.
Oct. 1.

obate duty—Administration and Probate Act 1890, *No.* 1060, *s.* 97 (*i*) *and* (*ii*)—*Partnership assets—Foreign domicile.*

Two partners domiciled in England carried on a partnership business in Victoria, well as in England and other places. One of the partners died, being at the time his death interested as a partner in all the partnership business.

Held, that the interest of the deceased partner in the partnership in Victoria was ble to probate duty in Victoria, and should be included in the statement of the eased's estate filed by the executrix under sec. 97 of Act No. 1060.

SPECIAL CASE stated by the Master in Equity under the *dministration and Probate Act* 1890, s. 98.

Philip Falk died in England on the 1st of February 1890, aving a will by which he appointed his wife his executrix.

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The deceased at the time of his death was
England, and was at the time of his death int
large extent as a partner in the business of P.
carried on in Melbourne, according to and under th
deed of partnership between himself and his son, Ju
who at the time of the death of the deceased was
in and domiciled in England. One of the prov
partnership deed was that in case one of the partne
before the expiration of the term of partnership, then
partner should settle with the representatives of the d
ner all accounts and things relating to the partnershi
was to be made for the purpose of enabling the surviv
purchase the deceased partner's share, and it was
provided that if the surviving partner should be
purchase, or be unable to find security for payment o
then the credits, property, and effects of the partnersh
collected in and converted into money, and after paym
partnership debts the surplus should be divided
surviving partner and the representatives of the dece
according to their respective shares and interest ther
the deceased nor the firm of P. Falk & Co. possesse
of the death of the deceased any real estate in Vic
deceased had some personal estate, and the firm of
was possessed of considerable personal estate, in the
consisting of stock in trade, bills receivable, and
current account. The surviving partner, before th
for probate, purchased the share of the deceased part
the property and effects of the partnership. Proba
of the deceased was granted in England on the 25th o
to Sarah Falk, the executrix named in the will. Ap
then made by the attorney under power of the e
probate be issued to him in Victoria, in order th
administer the assets of the deceased in Victoria. In
of the deceased's Victorian estate filed by the app
Master in Equity's office under the *Administration*
Act 1890, two items only were mentioned, viz., share
deceased at the time of his death in the National Ba
asia Limited, and in the Colonial Bank of Australia

tal value of 4,076*l.* and the applicant contended that these were e only assets in Victoria over which he sought dominion under e administration, and he also contended that the partnership terest of the deceased was recoverable in England, where the rviving partner was domiciled. The liabilities of the deceased in ictoria at the time of his death were stated to be *nil.* The uestion then arose whether the partnership interest of the deceased the firm of P. Falk & Co., at Melbourne, at the date of his ath, was chargeable with duty under the *Administration and robate Act* 1890, and whether it should have been included in the atement, and the Master in Equity then stated this case for the inion of a judge of the Supreme Court as to whether the interest Philip Falk in the partnership business should be included in e said statement.

Madden and *Box* for the Queen—All the assets of the firm in ctoria over and above the liabilities are liable to duty. The estion in this case is independent of the question of the domicile the deceased: *Blackwood* v. *The Queen* (*a*); *The Queen* v. *nith* (*b*); *The Commissioner of Stamps* v. *Hope* (*c*). The duty der the Victorian Act is in the nature of a succession duty, and oever succeeds to the property of the deceased is bound to pay ty: *Bell* v. *Master in Equity* (*d*). The partnership interest is de liable to duty by virtue of the provisions of sub-secs. 1 and 2 sec. 97 of the *Administration and Probate Act* 1890. The pital in the business is being used in this country, and the assets this locality should be responsible for duty. The executor has share in the partnership. The point in dispute is practically verned by the case of *Buckley* v. *Barber* (*e*). This case is ferred to in all the text books as being good law, and the law is nilarly laid down in *Addison on Contracts* (9th ed.), p. 1,182. the cases of *Taylor* v. *Taylor* (*f*) and *Knox* v. *Gye* (*g*), there e some expressions used which would appear to throw doubt upon e decision in *Buckley* v. *Barber*, but the former cases refer to

(*a*) 8 App. Cas. 82.
(*b*) 9 V.L.R. (L.) 404.
(*c*) [1891] App. Cas. 476.
(*d*) 2 App. Cas. 560.
(*e*) 6 Ex. 164.
(*f*) 28 L.T. (N.S.) 189.
(*g*) L.R. 5 E. & I. App. 656.

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a rule existing between persons who are not merchants, v. *Barber* expressly relates to the rule existing betwee

J. Dennistoun Wood for the representatives of P. is no real estate in Victoria belonging to the de partnership business was carried on in Englan places. "Personal estate" which is subject t must be limited to such estate as the grant would confer jurisdiction to administer. The gra confers no jurisdiction to administer the assets nership. In *Blackwood* v. *The Queen* (*h*) it w the statement of personal property to be made by under the Act should be confined to that property whi enables him to administer. *Reg.* v. *Smith* (*i*) deci principle. If the executor has not to make title to anywhere, no duty is payable anywhere. When one o dies, his executors have no right to interfere with th business: *Lindley*, pp. 590, 591. The right of the get paid the balance due upon the accounts. enunciated in *Buckley* v. *Barber* is completely at vari principles laid down in *Knox* v. *Gye* (*k*), and it is al the opinion expressed by James, L.J., in *Taylor* The executor of a deceased partner has no right to portion of the goods of the partnership. The goods be sold and the proceeds placed in a common fund, a fund the debts of the partnership must be paid. Th seeks to make a distinction between one portion of th the other, and further seeks to have the different with in a different way. If these local assets are held probate duty will have to be paid on the same a England and in Victoria. The debt does not arise u the partnership estate, and then it is a debt payable and not in Victoria.

Counsel referred to *Lindley on Partnership* 356-362; *The Partnership Act* 1891, ss. 27, 44; *Queen* (*m*); *Commissioner of Stamps* v. *Hope* (*n*).

(*h*) 8 App. Cas., p. 98.
(*i*) 9 V.L.R. (L.), p. 410.
(*k*) L.R. 5 E. & Ir. App., pp. 675 & 678.
(*l*) 28 L.T. (N.S.) 188
(*m*) 12 V.L.R., p. 56.
(*n*) [1891] A.C., p. 48

Madden in reply—It is clearly shown by *Power* v. *The Queen* (*o*) that probate duty in respect of the same estate may be payable both here and in England. The *Partnership Act* is not merely a declaratory Act, it is also an enacting Act, and whatever may be its provisions, it should not affect this case, as the deceased died before it came into operation: *Westlake on International Law* (2nd ed.), p. 233. No reference is made in the Act to the *lex inter mercatores*, and if it is declaratory at all, it is merely declaratory of the general rule between partners who are not *mercatores*.

Cur. adv. vult.

HIGINBOTHAM, C.J. This is a case stated by the Master-in-Equity for the opinion of the Court. The question we have to determine is whether the partnership interest of Philip Falk, deceased, in the business of Philip Falk & Co., which was carried on at Melbourne, in Victoria, until the time of his death, should be included in the statement filed by A. Beaver, the attorney under the will for the executrix named in the will, under sec. 97 (2) of the consolidated *Administration and Probate Act* 1890.

This question must be determined in accordance with the rule of interpretation of the same section and sub-section of the previous Act laid down by the Privy Council in *Blackwood* v. *The Queen* (*p*), which was followed and approved by the same Appellate Court in the *Commissioner of Stamps* v. *Hope* (*q*). The judgment in the earlier case states that:—

"The essential question is whether the Victorian Legislature intended that a legal personal representative in Victoria should state accounts of all personal or all movable estate belonging to the deceased wherever actually situate, or only accounts of so much *as comes under his control by virtue of his probate*."—(Page 91.)

After a minute examination of the provisions of the Act the judgment proceeds:—

". . . . The Victorian Legislature have imposed a tax, payable by an executor, as a condition precedent to the issue and efficacy of the probate *necessary for his action*, out of the estate while it is in bulk, and before distribution or administration has commenced. All these things, the person to pay, the occasion for payment, the fund for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax. . . . . Their Lordships think that the Victorian Legislature was contemplating the property which was under its own hand, and did not intend to

(*o*) 12 V.L.R. 50. (*p*) 8 App. Cas. 82. (*q*) [1891] A.C. 476.

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levy a tax in respect of property beyond its jurisdiction. And the general expressions which import the contrary ought to receive the which the appellant contends, and that the statement of personal pro by the executor, under sec. 7, sub-sec. 2, of the Act, should be *property which the probate enables him to administer.*"—(Pages 97-8

Higinbotham, C.J.

The question thus raised and decided by the Court *Blackwood* v. *The Queen* does not arise in the case n in which it is admitted that the firm of P. Fal possessed of considerable personal estate in Victoria, stock in trade, bills receivable, and debts due on cu for goods sold. But it is contended for the attorney for the executrix that the personal estate in this secti must be held to be limited not only to Victorian asset Victorian estate as the grant of probate confers the j administer, and that a grant of probate confers no j administer the assets of the partnership in Victoria. arguments, which have been addressed to us at some this point, the question has been raised as to the posi rights, and the interest, legal and equitable, of a surv and of the representative of a deceased partner in the the affairs of a partnership upon the death of one par have been clearly stated by the Lord Chancellor (Lo in *Knox* v. *Gye* (*r*), as follows:—

"I confess, my Lords, that I thought it was an elementary prin the partnership, which at law survives to the surviving partner, wh at law the whole interest in the partnership assets, which, treatin tenant, vests the whole of the partnership estates in him, was alw doctrine of a court of equity, that in equity the interest of a partne ship is that of tenancy in common as between the two partners, so t of a deceased partner have an interest in those assets which the alone can get at; and that the surviving partner alone having a leg property, there arises, necessarily, a right, as between the executor partner and him, to insist upon his holding those assets, which he so to the partnership interest, or subject to the share which the executo partner, in right of their testator, are entitled to claim. So much s law that a surviving partner cannot make use of the assets of a (apart at present from the Statute of Limitations, which I will co without being accountable for the use he has made of them. The deceased parner have a right to a sale of every portion of the partne completely are they held to be in a fiduciary position, so complete including the plant or houses, the machinery or stock-in-trade, description of property may be that comes into the hands of the sur

(*r*) L.R. 5 E. & Ir. App. 678-9.

ght of his survivorship at law, and which are all vested in that surviving partner y right of his survivorship at law, held to be property in all of which, whether they e chattels of the partnership, or estates of the partnership, the executors of a eceased partner have an interest commensurate with the extent of the share of their stator. They have a right, therefore, to have that property so disposed of that it ay be applied under the direction of a court of equity, according to the equitable ghts between the partners."

he right of the representative of a deceased partner to have the ontrolling power exercised by the Court in the liquidation and distri- ution of the partnership estate is expressly declared and enacted in ne "*Victorian Partnership Act* 1891," a codifying Act taken from ne English Partnership Act 1890, sec. 43, which provides that:—

"On the dissolution of a partnership every partner is entitled as against the other rtners in the firm, and all persons claiming through them in respect of their terests as partners, to have the property of the partnership applied in payment of e debts and liabilities of the firm, and to have the surplus assets after such payment plied in payment of what may be due to the partners respectively after deducting hat may be due from them as partners to the firm; and for that purpose any partner his representatives may, on the termination of the partnership, apply to the Court wind up the business and affairs of the firm."

his right or interest and the powers of the representative of a eceased partner, whether they be derived from the established octrines and practice of courts of equity or from the Statute, onstitute an existing right or interest under, and operate upon, ne administration of the assets of the partnership estate during ne course of liquidation and before distribution. They cannot be xercised by anyone except such representative; they must be exer- ised by him in the local area where the share is situated, that is, the lace where the business is carried on: see *per* Sir James Hannen, *n the Goods of Ewing* (*s*); and they can only be exercised by the epresentative by virtue of probate granted by the court having urisdiction in the locality where the share is situated. "The rant of probate does not of its own force carry the power of dealing ith goods beyond the jurisdiction of the court which grants it, hough that may be the court of the testator's domicile; at most it ives the executor the generally recognised claim to be appointed y the foreign country or jurisdiction": *Blackwood* v. *The Queen* (*t*). he probate granted in this case by the High Court of Justice in ngland to the executrix named in the will would not enable the xecutrix to exercise in Victoria any of the rights or powers she

(*s*) 6 P.D. 21. (*t*) 8 App. Cas. 92.

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possesses in connection with the share of the deces
assets in Victoria, until ancillary probate had bee
Victoria, or until a verified copy of the English pro
filed in the office of the Registrar, and sealed with t
Supreme Court of Victoria, under Part III. of the *A*
and Probate Act 1890; and in such case the seal could
until the statement had been filed in the office of the
the duty had been paid. The issue of a Victorian p
equivalent, is therefore "*necessary for the action*" of
of the deceased partner. It is by virtue of the Vict
that the personal estate of the deceased partner "*co*
control." It may be true that the Victorian prob
"*enable him to administer*" the property of the p
Victoria, but it, and it alone, enables the executor to
of the Court in compelling the due administration of
the surviving partner. The argument founded upon t
in the judgment of the Court of Appeal, namely,
statement of personal property to be made by the exe
be confined to that property which the probate en
administer," appears to me to be hypercritical. Take
tion with the point decided in that case, namely, t
personal estate only, and not foreign assets, is the s
duty, the expression is apposite and forcible. But if
strictly, according to its terms, to the facts of this cas
is that it is an expression unnecessary for and going
actual decision in the case in which it is found, tha
appear to have been intended to apply to a case like
and therefore does not bind us in this case.

It has been further argued by Mr. Wood, on the
Lord Westbury in *Knox* v. *Gye* (*v*), that the represen
deceased partner has no interest in or claim upon a
part of the partnership estate, and that his rights a
having an account of the property, of its collection and
and to due payment upon completion of the liquid
amount of the deceased partner's share, and that this,
a debt or chose in action, could have no other local e
in England, where the surviving partner, Julius Dav

(*v*) L.R. 5 E. & Ir. App. 675.

domiciled and resident at the time of the testator's death. This view may be correct, and that of Lord Hatherley, that a tenancy in common exists in equity between the representative of the deceased partner and the surviving partner, may be erroneous, without affecting, as it seems to me, the question which we have now to determine.

The amount ultimately found to be due by the surviving partner to the representative of the deceased partner is regarded in law as a debt accruing at the date of the death of the deceased partner: *Partnership Act* 1891," sec. 47. But this argument admits that before the amount of the debt is ascertained, and while the partnership estate is still in liquidation, the representative of the deceased partner has a right to claim an account of the property of the partnership assets, and to apply to a court of equity to wind up the business and affairs of the firm; and it is in virtue of that right, and as a necessary condition of exercising that right, that a Victorian probate has to be taken out by such representative. It is true that liquidation results in a debt, but the relation of the representative of the deceased partner and the surviving partner is other and more than that of creditor and debtor.

A similar answer may be given to the argument founded on the clause of the deed which gives the surviving partner the right to purchase the share of the deceased partner. The value of the share, excepting the book debts, must first be ascertained by three independent persons, one of whom has to be chosen by the representative of the deceased partner. The case, as amended, states that the surviving partner, before the application by A. Beaver for probate, purchased the share of the deceased partner. He could only do this, consistently with the terms of the deed, after he had acquired a right, as executor, to settle with the surviving partner all accounts and things relating to the partnership, and after he had, as executor, chosen a valuator; and for these purposes Victorian probate would or might be necessary.

It appears, therefore, that in every aspect of this case the executor of the deceased partner had an interest of some kind, and rights of some kind, and powers of some kind in and over the personal estate of the firm in Victoria from the day of the death of that partner; that Victorian probate was or might be "*necessary*

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for his action" for the protection of that interest, and in the exercise of those rights and powers; and he is therefore required by law to make a statement of the particulars of such personal estate of the firm in Victoria.

We are of opinion that the question submitted to us should be answered in the affirmative, namely, that the partnership interest of Philip Falk should be included in the statement.

HOLROYD, J. In my opinion the partnership interest of the deceased Philip Falk in the business of Philip Falk & Company, at Melbourne, at the time of his death, is chargeable with duty under the *Administration and Probate Act* 1890, and ought to have been included in the statement of the estate of the said Philip Falk in Victoria, filed in the Master's office. It is not a little surprising that three lawyers of such high eminence as the late Baron Parke, Lord Hatherley, and Lord Westbury should differ so widely upon what a layman would naturally suppose to be a well settled doctrine of partnership law. Parke, B., in delivering the judgment of the Court of Exchequer in *Buckley* v. *Barbour* (*w*), thus expressed himself:—

"Upon the whole, there is no satisfactory authority for the position that the title to partnership chattels survives at law, and the authorities the other way greatly predominate. Mr. Story treats it as the universally acknowledged rule that upon the dissolution of the partnership by death the property and effects thereof do not belong exclusively to the survivors, but are to be distributed between them and the representatives of the deceased in the same manner as they would have been upon a voluntary dissolution *inter vivos*."

Referring to the argument that, though the right to partnership chattels does not survive, the surviving partners have of necessity a *jus disponendi* for the purpose of winding up the partnership accounts, the learned judge after discussing the question thus concludes:—

"We doubt whether surviving partners have a power to sell and give a good legal title to the share belonging to the executors of the deceased partner when they sell in order to pay the debts of the deceased and of themselves; but, be that as it may, we think it clear that the survivors could have no power to dispose of it otherwise than to pay such debts."

Lord Hatherley treats it as an elementary principle that whilst at law partners are regarded as joint tenants, and on the dissolution

(*w*) 6 Ex., pp. 180 to 182.

of a partnership by death the whole of the joint assets pass to the surviving partner or partners by right of survivorship, yet in equity the relation of partners *inter se* is that of tenants in common, and the executors of the deceased partner have an interest in the partnership property commensurate with the extent of the share of their testator, of which interest the surviving partners are trustees: *Knox* v. *Gye* (*x*). Lord Westbury on the other hand has laid it down that a surviving partner is not a trustee either expressly or by implication, and that it is only by a loose use of the word that he can be so called. He holds that on the death of one of two partners the whole property in the partnership estate accrues to the surviving partner, and that he is the owner thereof both at law and in equity. "The right of the deceased partner's representative," he says, "consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership" (*y*). The opinion of the Court of Exchequer is the more logical, and gives the fullest effect to the maxim, "*Jus accrescendi inter mercatores locum non habet.*" The doctrine enunciated by Lord Hatherley is the more generally accepted, and the more convenient. It is approved by the three most eminent text writers—Williams, Lindley, and Lewin. Lord Westbury's opinion has the weight of his own great authority, and is supported by Lord Justice James. One thing is certain, that the representatives of a deceased partner have rights against the surviving partners, and that the surviving partners are subject to corresponding obligations towards the representatives of the deceased. These rights will now be found set forth in the "*Partnership Act* 1891," which has been copied from the English Act 53 & 54 Vic., chapter 39, and is mainly declaratory; and they constitute a relation between the representatives of the deceased and the survivors much more favourable to the former, as it appears to me, than that merely of creditor and debtor. The 43rd section of our Act runs thus:—

"On the dissolution of a partnership every partner is entitled as against the other partners in the firm and all persons claiming through them in respect of their interests as partners to have the property of the partnership applied in payment of the debts and liabilities of the firm and to have the surplus assets after such payment

(*x*) L.R. 5 E. & I. App., at p. 678. (*y*) *Ibid.*, at p. 67

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applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

The section is not well expressed, but it manifestly relates to every kind of dissolution whether *inter vivos* or by the death of any partner; and the same rights which under that section a surviving partner has against the representatives of a deceased partner must belong to the representatives of the deceased as against the survivor. These rights may be enforced in court; and the representatives of the deceased are entitled equally with the survivor to resort to the court for that purpose. While the distinction prevailed between courts of common law and courts of equity, they could be enforced only in a court of equity. The manner in which the court proceeds when its aid is invoked demonstrates that the representatives of a deceased partner have at least an equitable claim upon the estate of the firm commensurate with the share of the deceased therein after the liabilities of the firm have been satisfied. Under its direction the estate is sold or otherwise converted into money, and the deceased's representatives receive, in the absence of any special agreement to the contrary, precisely the same share of the proceeds as the deceased partner would have received if the partnership had been dissolved, not by his death, but by effluxion of time; the same share in fact as if they were tenants in common with the surviving partners. Undoubtedly the amount due from the surviving partners to the executors or administrators of a deceased partner is a debt, and always was a debt when ascertained, just as any sum of money due by a trustee to his *cestui que trust*. But if the executors or administrators of the deceased partner were no more than creditors, this extraordinary consequence as it seems to me must follow. In the event of a partnership of two members being determined by the death of one, the firm being solvent, and the surviving partner becoming immediately afterwards insolvent, "the whole property in the partnership estate at law and in equity," to adopt Lord Westbury's words, would pass to the assignee of the survivor as part of his separate estate, and the representatives of the deceased could only come in and prove for the debt due to them in competition with the other separate creditors of the survivor. The 47th section of our Act fixes the date at which the amount

lue, as well from continuing partners to an outgoing partner as rom surviving partners to the executors or administrators of a eceased partner, is to be deemed to have accrued as a debt. It as in view the enactments which concern the limitation of actions. t creates no new relation, nor establishes any relation previously nsettled. As to the debt, it puts a retiring partner on the same ooting as the executors of one deceased. The distinction between mere debt and the interest that devolves upon the representatives f the deceased partner is well illustrated by the 46th section. When surviving or continuing partners, before the final settlement f accounts and without any agreement authorising them so to do, mploy the deceased or outgoing partner's share of the assets in rrying on the business of the firm, they will be accountable, at ie option of the deceased's representatives or of the outgoing rtner, either for a proportionate share of the profits since the ssolution or for interest at 7 per cent.; whereas if they purchase e interest of the deceased or outgoing partner under an option ven by the contract of partnership, they will be liable only to pay e price in the manner provided by the contract. This section troduces no new principle. The only novelty is that it fixes the te of interest which may be claimed in the first event at per cent. And here again the executors or administrators a deceased partner are entitled in their representative pacity to precisely the same benefit as the living partner who tires.

It is clear now that the statement for duty to be made by an ecutor must set forth only so much of the estate of the deceased his Victorian probate will confer upon him the right to minister, and only so much therefore as is within the local area the probate jurisdiction: *Blackwood* v. *The Queen* (*z*); *Commis-ners of Stamps* v. *Hope* (*a*); and see *Re Smith* (*b*); and I agree th Mr. Wood that the issue of probate to Mr. Beaver will confer on him no right to administer the assets of the partnership of Falk & Co. in Victoria. But that is not the question. The are of Philip Falk deceased in the surplus proceeds of those sets after the liabilities of the firm have been discharged is an set of Philip Falk's own estate; and in my opinion locally

(*z*) 8 App. Cas., pp. 97, 98. (*a*) [1891] A.C., p. 481. (*b*) 9 V.L.R. 404.

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situated here, because the estate of the Melbourne firm, out of which the claim of Philip Falk's representative would have to be satisfied, is, or was when the partnership was dissolved by his death, locally situate in Victoria.

Hitherto I have dealt with this case, as it was mainly argued, on general principles. Turning now to the agreement of partnership, I observe that by the 18th article an option of purchasing the share of a deceased partner in the property of the firm is given to the surviving partner or partners. In the event of that option being exercised, the value of the property, excepting the book debts, which are to be divided as they are collected, is to be ascertained in the manner prescribed by the article, and the amount is either to be paid in cash or by mutual consent security may be given for the payment. If the survivor or survivors decline to purchase the share of the deceased or cannot find satisfactory security, the property is to be converted, the joint debts paid out of the proceeds, and the surplus divided between the survivor or survivors and the representatives of the deceased, which would have been, as I have already stated, the legal right of the parties, if no special direction to that effect had been given. Practically a deceased partner's share of the joint debts is exempted from the option of purchase; and in any case therefore, should the option be or have been exercised, Philip Falk's proportionate part of these debts will remain an asset of his estate under the control of his Victorian executor. Would the exercise of the option make any difference as regards his interest in the residue of the property? I think not. It would create a contract between the surviving partner and the Victorian executor for the purchase of an asset of the deceased's estate in Victoria, which contract the executor would have to carry out and complete, and by virtue of which he could recover the purchase money if payable in cash. If security were offered, he might refuse to accept an insufficient security. He might arrange the terms of the security which he would accept. He would have to appoint a valuator. In short, in his representative capacity he would stand in the relation of vendor to the surviving partner. For the foregoing reasons I think that the question which we have been asked to decide must be answered in the affirmative.

HODGES, J. Case stated under the 98th section of the *Administration and Probate Act* 1890, by which it appears—that P. Falk died in England on the 1st of February 1890; that at that time he was carrying on business in Melbourne, Adelaide, and London, in partnership with J. D. Falk; that this partnership had no real estate in Victoria, but had considerable personal estate in Victoria, consisting of stock in trade, bills receivable, and debts due on current accounts for goods sold; that at the time of his death the deceased and his partner were both domiciled in England; that the High Court of Justice in England has granted probate of the will of P. Falk to Sarah Falk, the executrix named in the will; and that one Beaver, as attorney under power of the executrix, is applying that probate be issued to him in Victoria to entitle him to administer the assets in Victoria of P. Falk. The Court is asked to determine whether the interest, or any part of the interest, of P. Falk in such of the assets of the partnership as are situate in Victoria, is chargeable with duty under the *Administration and Probate Act* 1890. The words "the personal estate of the deceased," in sec. 97 of the *Administration and Probate Act* 1890 would, *per se*, and apart from some express or implied limitation in the Act, be large enough to include the whole of the deceased's personal estate of all kinds and at all places; but the Privy Council in the case of *Blackwood* v. *The Queen* (*c*), held that the person to pay, the occasion for payment, the fund for payment, and the time for payment, pointed to the *Victorian assets* as the sole subject of the tax. And further on in the judgment the Privy Council say that the statement of personal property to be made by the executor under sec. 7, sub-sec. 2, of the Act (sec. 97, sub-sec. 2, of the present Act), should be confined to that "property which the probate enables him to administer." Accordingly we have to see what are the "Victorian assets," what is "that property" which the probate enables Beaver to administer. Now, if P. Falk had been carrying on business alone, and not in partnership, the decisions in the case of the *Attorney-General* v. *Bowen* (*d*), *Commissioner of Stamps* v. *Hope* (*e*), show that all personal chattels situate in Victoria, and all simple contract debts due from debtors resident in Victoria at the time of P. Falk's decease, would be

(*c*) 8 App. Cas. 82. (*d*) 4 M. & W. 171. (*e*) [1891] A.C. 477.

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"Victorian assets," would be property which the probate would "enable Beaver to administer" within the ruling in *Blackwood's Case*. But it is argued on behalf of Beaver that all these chattels and debts pass at law and in equity to the surviving partner, that the deceased partner's representative has no interest at law or in equity in the chattels and debts, that there is no fiduciary relationship existing between the surviving partner and the deceased partner's representative, that Beaver is entitled to an account from the surviving partner, and that the relationship between the surviving partner and Beaver is, and is only, that of debtor and creditor.

In *Buckley* v. *Barber* (*f*), the Court of Exchequer, guided by the principle that the "*jus accrescendi inter mercatores locum non habet*," decided that on the death of one partner the title to partnership *chattels* did not survive, and that, though the surviving partners might (which the Court doubted) have of necessity a *jus disponendi* for the purpose of winding up the partnership concerns, yet such partners have no power to dispose of such chattels otherwise than to pay the partnership debts. And as to choses in actions, the Court held that it was correct to say that "the legal title survives in many cases, *but not the beneficial interest.*" According to that case, therefore, it is clear that Beaver, by the Victorian probate, would acquire a title to the deceased partner's share in the personal chattels situate in Victoria, and would acquire a beneficial interest in the choses in action situate in Victoria. It is, however, contended on behalf of Beaver that *Buckley* v. *Barber* cannot now be considered as law, and must be taken to be overruled by *Knox* v. *Gye* (*g*). During the argument in this case *Buckley* v. *Barber* was cited, and it seems somewhat strange that it was not referred to in the speech of any of their lordships, though in two of those speeches opinions are expressed which are at variance with the decision in *Buckley* v. *Barber*. In this case Lord Hatherley said:—

"I confess, my Lords, that I thought it was an elementary principle of law that the partnership which at law survives to the surviving partner, which carries to him at law the whole interest in the partnership assets, which, treating him as a joint tenant, vests the whole of the partnership estates in him, was always subject to the doctrine of a court of equity, *that in equity the interest of a partner in the partnership is that of tenancy in common* as between the two partners. So that the

(*f*) 6 Ex. 164. (*g*) L.R. 5 E. & I. App. 656.

executors of a deceased partner have an interest in these assets which the surviving partner alone can get at, and that the surviving partner alone having a legal interest in the property, there arises, necessarily, a right as between the executors of the deceased partner and him to insist upon his holding those assets, which he so collects, according to the partnership interest, or subject to the share which the exeecutors of the deceased partner, in right of their testator, are entitled to claim."

This language is, I think, inconsistent with the decision in *Buckley* v. *Barber*; but if, in equity, the interest of the partner in the partnership is that of tenancy in common as between the partners, then, under the Victorian probate, Beaver would establish his title as tenant in common in equity to the partnership property which is situate here. Therefore, if the decision in *Buckley* v. *Barber* be right, or if the opinion of Lord Hatherley be right, the deceased's share of the partnership property situate in Victoria would, in my opinion, be Victorian assets, and would be property which the probate would enable Beaver to administer within the decision of the Privy Council in Blackwood's case. But it is contended that Lord Hatherley was a dissentient, and consequently that reliance cannot be placed upon the language used by him in the House of Lords. It is true that Lord Hatherley was in that case dissentient; but upon the subject on which I have quoted him only one other of their Lordships expressed an opinion, and it by no means follows that the other of their Lordships differed from Lord Hatherley on this question. However, take the language which has been most relied on for Beaver, that of Lord Westbury, at page 675. Lord Westbury there says:—

"In deciding this case it must be recollected that the representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership."

According to this, Beaver, under the Victorian probate, would have a right to have an account of the property of the partnership, of its collection and application, and I think this language shows that there must be a corresponding duty on the other party to collect and apply, and that, if he were proposing to deal with the partnership property situate in Victoria for his own private ends and not for partnership purposes, and to convey the property in Victoria

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to some person for his own private ends, as, for instance, to discharge a private debt, it cannot I think be doubted that the Victorian Court would, on Beaver's application as executor in Victoria, protect this partnership property, and prevent it being disposed of except in the partnership interest. And if this be so, it is clear that there is something more than a mere debt existing between the deceased's representative and the surviving partner, and although such representative may not have a specific interest in, or claim upon, any particular part of the partnership estate, he has an interest in the whole of the partnership estate, and a right to have that estate collected and applied to partnership purposes, and a remedy in equity to enforce that right. This is something very different from the ordinary relation of debtor and creditor, and in my opinion shows that even on the view of Lord Westbury the Victorian probate would have operation in regard to the chattels, etc., situate in Victoria, and would bring these chattels within the words, "Victorian assets" and "property which the probate enables him to administer," used in Blackwood's case. I am therefore of opinion that the partnership interest of P. Falk in the business of P. Falk & Co. at Melbourne is chargeable with duty.

Solicitor for the Queen: *Guinness*, Crown Solicitor.
Solicitor for the executrix: *P. D. Phillips.*

W. H. M.

TREMILLS *v.* BENTON AND ANOTHER.

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June 26, 27.
Oct. 1.

Lunatic—Contract with lunatic—Inadequacy of consideration—Unfair contract.

A contract entered into with a lunatic by a person who does not know or suspect m to be a lunatic cannot be avoided on the ground merely of the inadequacy of the nsideration. To set aside such a contract there must have been some fraud, imposi-n, or over-reaching on the part of the person seeking to uphold the contract, or ne evidence to show that the contract was not fairly made.

APPEAL from judgment of A'Beckett, J.

This was an action brought by the administrator of Henry remills to set aside two deeds granted by Henry Tremills to ohn Benton and his wife. The action was heard before A'Beckett, J., tting without a jury.

The facts are set out in the judgment.

Neighbour and *Grenfell* for the plaintiff.

Madden and *Bryant* for the defendants.

Cur. adv. vult.

A'BECKETT, J. This is an action brought by the administrator f one Henry Tremills to set aside two deeds in favour of John enton and Susannah, his wife, on the ground that their execution as obtained by undue influence, and also on the ground that at ne time of their execution Henry Tremills was, to the knowledge f the defendants, of unsound mind. The facts of the case are eculiar, and I have felt great difficulty in dealing with them. The roperty affected by the two deeds was land and buildings in itzroy, valued at 1,600*l.*, substantially all the property of the rantor. By these deeds, executed for the nominal consideration of en shillings, the grantor, subject to a life estate reserved to himself, ranted the lands to the defendants, part to one and part to the ther. He was eighty-six years old, and in bad health. The deeds ere executed on the 19th August 1890, and he died on the 31st of he same month. He had been living for some years on the rents f his property. After the death of his wife in 1878 he went to ive with his son, the plaintiff, who had a wife and several children.

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After staying with them, he lived for a time in Geelong, but visited his son at intervals. At the close of 1887 he went to live with Mr. and Mrs. Wickham, in North Fitzroy; left them in January 1889, and after this occupied rooms in one of his houses until he removed to his son's house on the 4th July 1890. Shortly before this his wants had to be attended to by Mrs. Paproth, the wife of one of the tenants. She was too ill to be examined, but her husband gives important evidence. After describing various eccentricities of Tremills, hereinafter noticed, he states that Tremills came to his bed crying at four o'clock in the morning, asking him to fetch his son, and saying he was dying. Paproth did as he was asked. The son, who was a lamplighter, was not at home, but his wife came immediately. She stayed, and looked after the old man, visiting him every day and for several days. The son also visited him, and he seems to have been gratified by these attentions. In response to the invitation of his son's wife, the old man went to his son's house on Friday, 4th July. According to the evidence of his son, his wife and daughter, he seemed quite contented with their treatment of him until the morning of Saturday, the 12th July, when he got violently angry; declared that he had had no breakfast and no fire. The son's wife made him a custard, and told him that he had had his breakfast. Upon this he said, "You infernal liar; God forgive you for telling such lies," and tried to strike her. He insisted upon going away, and told the children to fetch a cab. The mother told them not to go for one; upon which the old man went into the street, stopped a greengrocer's cart, and induced the driver to remove him and his belongings from his son's house. Up to the arrival of McKellar (the driver of the cart) I have to depend upon the evidence of the son's wife and daughter as to the circumstances under which Tremills left his son's house. From this point, however, a disinterested witness gives his narrative, which I receive without suspicion. He went into the house, and saw the wife and daughter. His evidence is that they said, "Don't take any notice of him; he doesn't know what he is saying. The man's out of his mind." They were crying; the old man heard, but insisted "I should shift." McKellar accordingly put a chair and some other articles of the old man's into the cart, and was going to drive to the old

man's house, but on the way he asked McKellar if he knew anyone who would take care of him, and induced McKellar to take him to his own house. He told McKellar that when "he dropped mortality he would leave him all his furniture, and will him all his property." During his week's stay with McKellar his conduct was eccentric. He was continually making large fires, and poking them out. On one night he nearly set the house on fire. McKellar was making butter boxes, and Tremills complained that his doing so damaged the house, which it did not. He said that his son and daughter had "tried to put him in his box; tried to starve him, and knocked his teeth out." Not liking a new house to which McKellar removed, the old man left McKellar, and returned to live on his own property, on a Saturday, eight days after leaving his son. On this Saturday he slept at Paproth's. On Sunday morning he went to the defendants', the Bentons. They were tenants of his. He first made their acquaintance in May 1890, and became friendly with them. They were members of a brotherhood attending the same church, and they attended Bible meetings in Tremills' room. Tremills held peculiar religious views, and was fond of expounding the Scriptures, and talking with acquaintances on religious subjects. On this Sunday morning, according to Benton's evidence, he said "His son had turned him out again, wouldn't have him back, and would I take him in; if you'll take me in, I'll give you the rent of 211 Napier Street, and the use of 213 Napier Street for eight years." He told Mrs. Benton that "His son had turned him out and served him shameful." The Bentons agreed to take him to live with them. On Monday, in consequence of a message sent by Benton, Mr. Mann (a solicitor then with the firm of Messrs. Davies & Campbell) called on Tremills. Mr. Mann had made a will for Tremills in June 1890, by which he left all his property to his son for life, and after his death to be divided between his son's children. The object of sending for Mr. Mann was to have a codicil prepared, and as the validity of this codicil depends upon much the same considerations as those which affect the deed impeached in this action, I shall refer at length to Mr. Mann's evidence. Speaking of his visit of the 20th July, he says: "I hear you want to alter your will; are you not satisfied with it? No; I want to alter it altogether. What do you propose? Before

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I do so I think I ought to explain. I am not going it was; I am going to leave the son out. Why is th treated me in a disgraceful manner. Are you not son's house? No; I was, but I was kicked out into a dog; they wouldn't look after me; you know I a and require looking after. I said, Do you think it i the property away; can't you be friends again? No a penny; now do you think it was proper treatment? not, if it was true. Every word of it is true. What do with your property? Mr. and Mrs. Benton, whe living, have been very good and kind to me, taking m me a home; I want to make provision for their proposed to leave all to them absolutely. I pointe be hardly fair in reference to his grandchildren, leaving a legacy in return. He would not hear of th them be tenants of these properties for any term? do that. Then he suggested ten years. I asked hi youngest grandchild. He said, Thirteen. I said, Cut to eight years, then the grandchildren can take eq youngest comes of age. He thought that would do, you give my son any chance. No; that's all right that some provision should be put in binding the B after him while he lived. Instructions were take binding the Bentons to look after him. A codicil, dra these instructions, was executed by him on 22nd was nothing in the speech or manner of Tremills wh to Mr. Mann any mental defect or subjection to t anyone. He was wrong as to the age of the you there was an infant of two years, whom he ought to bered; but I do not attach any importance to his fo that subject. The next matter of business in w engaged was raising a loan of 200*l.* from a building off a debt of 100*l.*, due to another society, and other him a balance of 50*l.* to spend. Mr. Burrell, an building society, had an interview with Tremills on the and Mr. Grant, the solicitor, subsequently. Tremill he thoroughly understood the transactions involved, of the means by which they were carried out. I n

instructions for the deeds assailed in this action. Mr. Grant, the solicitor, called on the 14th August, and saw Tremills about the mortgage matter, with the details of which Tremills showed his familiarity, and he gave directions as to paying Davies & Campbell's bill of costs, getting his deeds from them, and handing over the balance of the money to Benton, as his agent. After this he said to Mr. Grant, "I want to talk to you about other matters. I wish to make a settlement of the property on Mr. and Mrs. Benton, as they have been keeping me, and have agreed to keep me in the future—the corner shop to Benton, he to pay the mortgage; the other two houses to Mrs. Benton." He used the words, "deed of gift." Mr. Grant asked, "Do you mean to reserve the rents for your life?" He said, "Yes; that would be a better way." Grant asked Tremills if he wished him to prepare the deeds. He said, "Yes; I can't agree or get on with my son and his family." Grant said he was sorry to hear it, and "Couldn't they be reconciled?" Tremills said, "No; I have tried it many times, and they are cruel to me." Grant then took notes, and prepared the deeds, and took them to Tremills on the 18th August, and read them over to Tremills in the presence of Mr. and Mrs. Benton. Tremills said the deeds were what he had told Grant to prepare, but he would like another deed prepared binding the Bentons to keep their word to support him and keep him as they had done before. "I don't say they wouldn't, but it is better to have them bound," he said. A deed of covenant was accordingly prepared, and taken to the house by Grant on the 19th August. The Bentons executed it, and then Tremills executed the deed of gift. In all his conversations with Grant on these subjects, and in general conversations on matters occurring years ago, Tremills showed that he was in the full possession of his faculties, and not acting in subjection to influence. The evidence of Tremills' instructions as to codicil, mortgage, deed of gift, and his execution of these instruments, is of the clearest character, all indicating free will and perfect comprehension of the acts done, and is furnished by three intelligent and trustworthy witnesses, as well as by the defendants themselves. After the execution of the deeds of gift, according to the evidence of the defendant, John Benton, Tremills threw into the fire certain papers, amongst which presumably were the will of June 1890 and

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the codicil of the 22nd July 1890, which the deeds of gift had left little or nothing to operate upon. I have now to consider whether the deeds in question are assailable on the ground of undue influence, and as to this part of the case I feel no doubt that the plaintiff has failed to establish his case. Tremills' bounty to the defendants seems to have been altogether spontaneous. He made to McKellar much the same offer as he afterwards made to the defendants—to give them a lease. Directly the offer was made, they spoke of it to several persons who had access to Tremills. The reason for substituting the deed of gift for the term of years given by the codicil was, as Tremills told Grant, that he wished to save the Bentons from being troubled, and put to expense about repairs, by the executors of his will or his son's family. There is some evidence of loud and angry conversation having been heard in the defendants' house, and of apparent reluctance on Tremills' part on one occasion to return to the Bentons' house when Mr. Benton came to fetch him, but the general tenor of the evidence is opposed to the supposition that Tremills' volition was unfairly affected by anything done or said by the defendants, and is certainly not sufficient to prove undue influence.

As to the second ground of attack, that Tremills was of unsound mind at the time of the execution of these deeds, there is much more to be said. Taking the law as applicable to a deed of gift to be the same as with regard to a will, no amount of mere eccentricity will invalidate it; nor would delusion even, if the delusion were on a subject foreign to the disposition of the property, or which could not affect the choice of the objects of bounty; but a delusion as to the persons who had originally been preferred and were afterwards rejected, that delusion being the assigned reason for rejecting them, would invalidate. It is contended for the plaintiff that such a delusion has been proved in this case. I have therefore to consider the various circumstances relied on by the plaintiff as evidence of unsoundness of mind, leading to the conclusion that at the date of the deeds of gift Tremills was under a delusion with respect to the misconduct of his son. The first eccentric act proved occurred in September 1889, when Tremills put on his working clothes on a Sunday, and hammered nails uselessly into a piece of wood, and heaped coals in the middle of the room. At the same time he

brought a panful of crusts to one witness, and asked him to break them up for him, saying that was all he had to exist upon. For the last year of his life his memory was very bad. He would give directions to have a house prepared, or as to proceeding against tenants, and would forget having done so; would be paid rent, and would demand it again directly after its payment. In the beginning of 1890, he began to make out a will in favour of a niece of his, and forgot having done so next day, and explained to his niece that he could not make such a will, as the property could not be distributed, and was to go to the family. [His Honor dealt with some further evidence as to Tremills' eccentric behaviour.] Coming to the period nearer the date of the deeds impeached, the instances of eccentricities become more marked. His conduct whilst staying in his son's house was strange, and, as described by the plaintiff and his wife and daughter, showed that he was not in full possession of his faculties; but I give more weight to the evidence of McKellar, who describes things said and done by Tremills during his eight days' stay with him, which showed unsoundness of mind. After he left McKellar, and went to live with the Bentons, he behaved in a manner scarcely reconcilable with sanity. On the 18th August Benton fetched in a neighbour (Mr. Dent), and showed him a pillow-case which the old man had set fire to on the night before, and ashes which he had put into tin cups. The old man came in shaking, and said, "Is anything the matter? Have I done anything?" Benton said, "I'll let you know what you have done; you'll know all about this." Later on the same night, about twelve o'clock, Benton went to a police office, and told the constable there that an old man was in his house who was behaving in such a way that they were afraid to go to bed and go to sleep. The constable accompanied Benton to the house, and saw Tremills sitting there. The constable asked, "What's the matter?" Tremills said, "They know what's the matter; they are trying to kill me." He sat holding up his hands, and couldn't explain. Benton said, "Can't you take him away; he'll be doing some injury; he is not safe." The constable refused to take Tremills into custody, and told Benton he would have to get a warrant, and have him examined by two doctors. The Bentons, husband and wife, give very different versions of the reasons for calling in Mr. Dent and the

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constable, and of what happened in their presence. They say the pillow was burnt by an ordinary accident, and that the constable was called in to appease the old man, who threatened to go and fetch a constable to Benton, because Benton refused to give him a candle. I believe the version of the other witnesses, as they have no apparent motive for misrepresenting the facts, and the Bentons, in answer to interrogatories, swore "that during the whole period Tremills resided with them they never observed any behaviour or conduct in him of an eccentric nature"—a statement inconsistent with even their own version of these incidents. On the 20th August, Tremills had in his possession over 50*l.* in notes; a large sum for a man in his position. The Bentons, who knew he had it, swear that they did not find it during his illness, or after his death. Taking their statements to be true, it appears that Tremills must have made away with it himself in some unexplained way of which no trace is left. His getting rid of this money in this manner, with nothing to show for it, is a matter which deserves attention in considering his sanity. As is usual in these cases, we have medical evidence. [His Honor reviewed the evidence of the medical witnesses.] I have the medical evidence, which is at least consistent with the supposition that Tremills' brain was diseased, and I have other evidence of many acts of his which indicate unsoundness of mind. Taking these acts by themselves, I should not consider them of importance as showing incompetence with regard to the deeds which he executed, and as to which he showed a perfect comprehension, but I regard them as of importance in considering the question of whether the sudden dislike which he manifested to his son was due to an insane delusion as to his son's behaviour. Ten days before his visit to the Bentons he was living in his son's house, to which he had voluntarily gone. Before he went to his son's house his son's wife had visited daily, having been sent for in the early morning, when he was in great distress of mind, and having immediately obeyed the summons. According to the Tremills, husband, wife and daughter, the old man was happy and contented up to the morning of his sudden departure, and directly after this departure he untruly asserted that he had been turned out of the house, and exhibited the greatest animosity to his son, giving this groundless complaint as his reason for it. I cannot

regard this complaint as mere exaggeration of what had actually occurred. It was a falsehood or a delusion. When Mr. Mann questioned him as to its truth, he said it was true, every word of of it. He repeated the statement to many people, amongst others to Mr. Evans, a witness for the Bentons, to whom he said that Mr. and Mrs. Benton had taken him in when his son had turned him out. According to all the evidence his son had never turned him out. To McKellar he complained of attempts to starve him, and of assaults upon him. After the argument had been concluded, I recalled the witness McKellar to ascertain whether the old man could possibly have returned to his son's house seeking admittance after he had left McKellar's, and then have been rejected. McKellar's further evidence satisfies me that this could not have occurred. Several witnesses depose to the kindly way in which the old man used to speak of his son, and of his son's wife and daughter. He made a will in favour of his son and his son's children on the 30th June 1890. In support of the direct evidence upon the subject of the son's behaviour to his father, which mainly comes from interested witnesses, there is the improbability of a sudden change in the behaviour of the son and his family to the old man. Up to the 30th June 1890, their behaviour had been such that he regarded them as proper objects of his bounty. Shortly after that date he went to live with them, and in doing so he showed that they had not alienated his affection by misconduct. It is unlikely that the kindness and forbearance that they had shown continuously would suddenly change to cruelty. The statements that they tried to starve him and struck him, which he made to McKellar, were probably as untrue as we know his statement to have been that his son had turned him out and kicked him into the gutter like a dog. After fully considering all the facts, I find that when the deeds were executed Tremills was under an insane delusion with respect to his son's behaviour to him. Taking this to be a delusion, it was undoubtedly a delusion which probably affected the disposition of his property by the codicil and by the deeds. This is no conjecture or inference. It is established by the defendants' evidence of what Tremills said to Mr. Mann and Mr. Grant in giving instructions for the codicil and for the deeds. I have next to consider, as a matter of law, whether the existence of this delusion justifies me

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in setting aside the deeds as against the Bentons, wh
aware of it, and entered into a covenant to keep Trem
keep him for some weeks, in consideration of these d
been executed. The law upon this subject is stated
the case of *Hassard* v. *Smith* (*a*):—"The rule which n
both at law and in equity, with reference to contracts
by a person apparently of sound mind, and not known
contracting party to be insane, is that such contracts,
and completed, and if fair and *bonâ fide*, will not be
set aside. From this, and other authorities referred to
I gather that it is not enough to invalidate the cont
other party should have been ignorant of the lunacy an
valuable consideration, but that the sufficiency of the
is a matter to be regarded as affecting the fairness of t
The transaction may have the legal essentials of a co
would be binding between some persons, and yet may no
where one party, unknown to the other, is a lunatic.
actions between Tremills and the Bentons be regarded
it was certainly a very bad one for Tremills. The
given by them was altogether inadequate. They must
from his great age, and from the doctor's statement, th
probably soon die, and could not live long. His
infirmities were apparent to every one in contact with hi
that neither he nor the Bentons regarded the matter
in which he expected to receive, or they supposed tha
giving, full value. The first arrangement was that he
a will in their favour, and he made it without t
entering into any binding undertaking. Then he alter
and determined to have a deed of gift prepared instead
this was drawn up as a voluntary deed—an act of mere b
covenant which they subsequently entered into was an
They were willing to enter into this undertaking, and
but there never was any real bargaining between the
they contracted to keep him in consideration of his giv
houses which he made over to them by deed. As t
fides, they knew quite enough to lead them to suspect
though their suspicions must have been allayed by tha

(*a*) Ir. Rep. 6 Eq. 429, p. 433.

which he set about making the dispositions in their favour. On the whole, I think that the transaction between Tremills and the Bentons does not fulfil the requirements stated in the authorities above referred to so as to stand good notwithstanding Tremills' lunacy. I decide that the deeds are to be set aside. The defendants will be accountable for rents received since the death of Tremills, and will be allowed for all expenditure in respect of the property, including the sum paid for registering the deed under the *Duties on Estates Act*, which will relieve the property from liability to duty under the same Act. John Benton should be paid for maintaining Tremills from the 20th July to his death, and all expenses in relation to his last illness and death. The parties will abide their own costs.

From this judgment the defendants now appealed.

Madden (with him *Bryant*) for the appellant—The finding of the primary judge is that the deceased was of sound mind, but that he suffered from delusions. A delusion must be a distinct delusion operating in a particular direction, and must be as to the belief in a thing which assuredly did not exist. There is no such delusion proved in this case which would invalidate these deeds. The principles which govern cases for setting aside a deed of gift are not the same as those which govern actions for setting aside a will. A deed for consideration differs from a deed of gift, and a deed of gift differs from a will. It is found as a fact that the appellants acted *bonâ fide*, and without knowledge of the insanity of the deceased. Assuming that there was some consideration given for the deed, the principle seems to be that where persons bargain and deal with one another, so that their relation to each other eventuates in a contract, then, although one party was insane, and his insanity was unknown to the other party, the contract will stand, unless there has been such an "over-reaching" on the part of the sane person so as to give him an actual advantage over the insane person. In that sense only does the consideration of the fairness or unfairness of the bargain come in. The authorities use the word

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"fair" merely *quoad* that particular contract, not with the fact whether the consideration was adequate in an but whether the parties dealt with one another fairly, they got what they wanted. If there was no chican the contract will stand.

[HOLROYD, J. Inadequacy of consideration does no show unfairness, but it is an element in the cons unfairness. Very great inadequacy may be strong unfairness.]

Applying that principle to this case, the appell succeed, because the primary judge seems to have co mere inadequacy of consideration proved unfairnes There was no fiduciary relationship between the parties In contracts with persons of unsound mind, where t tracting party has no knowledge of the insanity of th Court has invariably acted upon the principles already *Niell* v. *Morley* (*b*); *Baxter* v. *Earl of Portsmouth* v. *Joddrell* (*d*); *Howard* v. *Digby* (*e*); *Dane* v. *Ki Molton* v. *Camroux* (*g*); *Beavan* v. *McDonnell* (*h*); *Hooper* (*i*); *In re Doull* (*k*); *Hassard* v. *Smith* (*l Loan Co.* v. *Stone* (*m*).

Neighbour and *Grenfell* for the respondent—The though they have been found to have acted *bonâ fide* i nevertheless obtained an advantage which is certainly u consideration was undoubtedly inadequate, and the ci of the case being so very peculiar, the Court should i prevent the appellants obtaining an advantage which not have obtained: *Elliot* v. *Ince* (*n*); *Story's Equit dence*, par. 228; *Exparte Finlay* (*o*).

(*b*) 9 Ves. 478.
(*c*) 5 B. & C. 170.
(*d*) Moo. & M. 105.
(*e*) 2 Cl. & F. 630, p. 661.
(*f*) 8 C. & P. 679.
(*g*) 2 Ex. 487, 501; 4 Ex. 17.
(*h*) 9 Ex. 309.
(*i*) 3 Sm. & G. 153.
(*k*) 7 V.L.R. (I.) 70.
(*l*) Ir. Rep. 6 Eq. 429.
(*m*) [1892] 1 Q.B. 599.
(*n*) 7 De G. M. & G. 47
(*o*) 10 V.L.R. (E.) 68, p

Counsel also referred to the following cases:—*Reed* v. *Buck* (*p*); *Baker* v. *Loader* (*q*); *Huguenin* v. *Basely* (*r*); *Longmate* v. *Ledger* (*s*); *Cooke* v. *Lamotte* (*t*).

Madden in reply.

The following cases were referred to:—*Broughton* v. *Knight* (*v*); *Fry* v. *Lane* (*w*); *Harrison* v. *Guest* (*x*); *Whalley* v. *Whalley* (*y*); *Clarke* v. *Malpas* (*z*).

Cur. adv. vult.

HIGINBOTHAM, C.J. Appeal from the judgment of A'Beckett, J. This action is brought by the administrator, John Tremills, to set aside two deeds, dated 19th August 1890, by which the deceased, Henry Tremills, a man eighty-six years old, granted to the defendant, John Benton, and to his wife, Susannah Benton, respectively, two pieces of land valued at 1,600*l.*, reserving the life estate therein to himself.

Two grounds were relied on for the relief asked for—first, that the deeds were obtained by the defendants from the deceased, Henry Tremills, by the exercise of undue influence, and at a gross undervalue; and second, that at the time of the execution of the deeds the said Henry Tremills was, to the knowledge of the defendants, of unsound mind, and absolutely incapable of understanding those instruments. The circumstances of the case were very peculiar, and the learned judge states that he had great difficulty in dealing with them. After a very careful review of the evidence, he arrived at conclusions generally in favour of the defendants, upon the issues of fact raised by the pleadings. He found that the plaintiff had failed to establish his case upon the ground of undue influence. He also found that at the time of the execution of the deeds the deceased was shown by the evidence to be in full possession of his faculties, and not acting in subjection to influence; that when he gave instructions as to the codicil and mortgage and the deeds of gift, and when he executed those instruments, his words

(*p*) 10 V.L.R. (E.) 33.
(*q*) L.R. 16 Eq. 49.
(*r*) Wh. & Tud. L.C. (6th ed.), Vol. II., p. 597, p. 619.
(*s*) 2 Giff. 157.
(*t*) 15 Beav. 234.
(*v*) L.R. 3 P. & D. 64.
(*w*) 40 Ch. D. 312.
(*x*) 8 H.L. 481; 6 De G. M. & G. 424.
(*y*) 1 Mer. 436.
(*z*) 4 De G. F. & J. 401.

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and conduct indicated free will and perfect comprehension of his acts; that at the same time the deceased laboured under an insane delusion with respect to his son's behaviour towards him, but that the existence of this delusion was unknown to the defendants, and that, although they knew enough of him to lead them to suspect his sanity, their suspicions must have been allayed by the manner in which he set about making the disposition of his property in their favour. We are not satisfied that the learned judge has arrived at a wrong conclusion upon any of these questions of fact, and if his conclusions be accepted they go a long way to support the case of the defendants. One additional question only remained to be considered, namely—Was the contract itself, which was entered into by the parties, a fair and *bonâ fide* contract? If it was, this case is clearly within the legal and the equitable rule by which such a contract, if executed and completed, is to be upheld, although it has been made by a person of unsound mind with another person who has no knowledge that he is contracting with a lunatic. In determining whether a contract is or is not unfair, the adequacy of the consideration is, as the learned primary judge observed, one of the elements to be regarded; but it should be added that it is only one element, and that in order to justify the avoidance of a contract on this ground, the inadequacy of the consideration must be so great as to be unconscionable, and to amount in itself to conclusive and decisive evidence of over-reaching or fraud. The learned judge thought that the consideration given by the defendants was altogether inadequate; that neither the deceased nor the defendants regarded the matter as a bargain in which the former expected to receive or the latter supposed that they were giving full value; that though the defendants were willing to enter into their undertaking, and did so, there was never any real bargaining between the deceased and them by which a contract was made to keep him in consideration of his giving them the lands which he made over to them by deed; and that on the whole the transaction between the parties did not fulfil the requirements stated in the authorities so as to stand good notwithstanding the lunacy of the deceased; and he therefore decided that the deeds should be set aside. I feel sincere diffidence in dissenting from the ultimate conclusion of this well considered judgment, but I am bound to declare that I am

wholly unable to assent to it, or to the grounds upon which it appears to be rested. Holding, as we are bound to do, that proof of undue influence on the part of the defendants has failed, and that the deceased had full possession of his faculties, and perfectly comprehended what he was doing, I cannot find any evidence whatever that the transaction between these parties was in itself wanting in fairness and *bona fides*. The deceased, who was advised by his solicitor, had a single, definite object in view. Under the influence of an insane delusion, he wished to deprive his son of his property after his own death, while at the same time he sanely and prudently desired to retain full possession of it during the remainder of his life, and also to secure for himself the benefits and comforts of a home. He bargained for this as a condition of his gift, and the defendants complied with his wish, and covenanted to carry it into effect. The burden of the covenant was in the event small in proportion to the money value of the gift, but the disparity was not caused by the act or demand or undue influence of the defendants. They gave the consideration they were asked to give, and that was all that the deceased in his insane delusion, and in his prudent regard for himself, thought of requiring. The bargain was made a legal and binding bargain by the act of the deceased, and apart from the suspicion, which we must hold to be unfounded, of undue influence having been employed to bring it about, presents no trace of fraud or over-reaching on the part of the defendants, although they undoubtedly reaped the larger share of the benefit of the bargain. I think that we should be departing from the principles on which courts of equity have acted in similar cases if these deeds should now be set aside at the instance of the administrator. He may claim sympathy as being the object of the unjust suspicion of his father, but he is not entitled to the relief he seeks for in this action. We are of opinion that the appeal must be allowed, and that the judgment appealed from, except so far as it relates to costs of plaintiff and defendants, should be set aside. There will be no costs of appeal.

HOLROYD, J. After much hesitation, and examining carefully all the authorities that were cited, I have come to the conclusion that a contract entered into with a lunatic by a person who does

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not know him to be, or suspect him to be, a lunatic, cannot be avoided by the lunatic or by his representatives after his death on the ground merely of the insufficiency of the consideration; but that some fraud or imposition must have been practised by the party who desires to uphold the contract, or something done by him which would render it unconscientious on his part to take advantage of the bargain, to afford a ground for setting it aside. For that reason only I differ from the learned primary judge. The result of the insane delusion under which the deceased laboured has been to inflict a great hardship upon his administrator, and to confer upon the defendants the benefit of a contract which they would not otherwise have obtained. I agree, therefore, that the appeal should be allowed without costs, and that the direction of the learned primary judge as to the costs below should stand.

HODGES, J. This is an appeal from the decision of A'BECKETT, J., setting aside two deeds, dated 19th of August 1890, made by Henry Tremills. The plaintiff, who is the administrator of the estate of H. Tremills, sought, according to his pleadings, to have the two deeds set aside upon the grounds that the deeds were obtained by the defendants by the exercise of undue influence, and at a gross undervalue, and that at the time of the execution of the deeds H. Tremills was, to the knowledge of the defendants, of unsound mind. The learned judge has found, and in my opinion has so found on sufficient evidence, that there was not undue influence, that there was *bona fides* on the part of the defendants, and that the defendants did not know that H. Tremills was insane; but he has declared the deeds void on the ground that H. Tremills was insane at the time that he executed them, and that they were not "fair" within the meaning of that word as used in the judgment in *Hassard* v. *Smith* (*a*), and it is against this decision that the defendants have appealed. The learned judge appears to have acted on the following passage, which he quoted from the case of *Hassard* v. *Smith*:—

"The rule which now prevails, both at law and in equity, in reference to contracts entered into by a person of apparently sound mind, and not known by the other contracting party to be insane, is, that such contracts, if executed and completed, and if fair and *bona fide*, will not be held void or set aside."

(*a*) Ir. R. 6 Eq. 433.

This, I think, correctly states the law if the word "fair" be understood in the sense in which the Vice-Chancellor must be taken from the context to have intended that it should be understood. And by "fair" I understand him to mean not unfair, not unconscientious, not over-reaching. I think it refers to a contract not obtained by imposition, but I do not think that it would correctly give the Vice-Chancellor's meaning to substitute for the word "fair" the words "for full consideration." And I think that the context shows this, because shortly after enunciating the above proposition the Vice-Chancellor says:—

"That was followed by *Bevan* v. *McDonnell*, where the contract was one for the purchase of land, entered into by the plaintiff, who paid a deposit on account of the purchase money. He afterwards brought an action to recover back the money so paid, and although it was proved that he was a lunatic at the time of the contract, and incapable of understanding its meaning, yet, as the defendant had entered into the contract and received the money *fairly* and in good faith, and without knowledge of the lunacy, it was held that he could not recover back the money."

There the word "fairly" could not, I think, be referring to a perfect equality of the consideration given by each party to the contract. Again, a little further on, the Vice-Chancellor quotes with approval the following passage from *Story*:—

"The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise *non compotes mentis*, is fraud."

The Vice-Chancellor could not quote, with approval, Story's opinion that the ground on which courts of equity set aside these contracts is *fraud*, if he was deciding that inequality of consideration was a sufficient ground for setting aside such contracts. Again, the Vice-Chancellor a little further on again quotes with approval Story's view that "If a purchase is made without any knowledge of the incapacity, and *no advantage has been taken*, courts of equity will not interfere to set aside the contract, etc." Here again the Vice-Chancellor shows that what invalidates these contracts is not mere inequality of consideration, but the taking of an advantage. If an advantage is taken, the contract is not "fair." This being the meaning which, in my opinion, should be given to the word "fair" in the proposition of the Vice-Chancellor first quoted above, I now proceed to apply that proposition to the deeds in question. H. Tremills has been found by the learned judge, on what I think

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is sufficient evidence, to have been apparently of sound mind, and not known by the defendants to have been of unsound mind. The contract is, beyond question, an executed and completed contract. The judge has also found *bona fides* on the part of the defendants. Consequently the deeds are not to be set aside if they are "fair." Now, I am not disposed to dispute that the inequality of consideration may be of such a character as to show over-reaching, or imposition, or fraud, or that the contract was not "fairly" made, and consequently was not a fair contract within the meaning of the proposition I have quoted. But then the contract is set aside not because the consideration is unequal, but because from the extreme inequality of the consideration, over-reaching, or imposition, or fraud is inferred. What are the considerations given by the several parties to these contracts? H. Tremills, reserving a life estate in certain property to himself, conveyed the residue of the fee, subject as to portion of the property to a mortgage, to secure a sum of 200*l.* which had been advanced to H. Tremills, this sum being repayable in ten years by fortnightly instalments of 1*l.* 4*s.* 8*d.* The defendants (stating the consideration given by both) undertook to repay the sum of 200*l.* by the fortnightly repayments. They undertook to support, maintain, provide for, keep, clothe, and nurse H. Tremills during his life in the same manner as they had done, and to pay his funeral expenses. The unencumbered fee simple of the property is said to have been worth 1,600*l.* H. Tremills was an old man of eighty-four or eighty-five years of age, and in failing health. Is that an unconscientious contract? Is there in the nature of the consideration given and taken anything tending to show imposition, over-reaching, or fraud? Look at the transaction first from the deceased's standpoint. During life, he has as pocket-money any little revenue that may come from his property, and he is to be fed, and clothed, and nursed, and housed by the Bentons, and at their expense. A man in the situation in life of the deceased, and whose working life was over, might consider that he had made a very safe, sure, and satisfactory provision for the closing years of his life, and that all his wants were abundantly provided for. The defendants, on the other hand, saw that, by the terms of the different deeds, the deceased had caused provision to be made for himself during life, that they

had the burden of repaying the 200*l.* and interest by fortnightly repayments; that though they were repaying the 200*l.* and interest, and were so far out of pocket, they would derive no advantage from the property until Tremill's death; and further, that they had the trouble and expense of feeding, clothing, nursing, and housing Tremill until his death: in other words, that during Tremill's life they were giving everything and getting nothing, and that when he died they would get the fee simple of property worth 1,600*l.*, subject to any then unpaid portion of the mortgage money. Though I feel very unwilling to differ from the carefully considered judgment of A'Beckett, J., I think that this was a fair contract, that the inequality of the consideration is not such as shows any over-reaching, any imposition, any fraud, any unfair dealing; and I think that the contract was not an unconscientious one. In the event it has turned out an advantageous one for the defendants, as Tremills died within a fortnight of the making of the contract; but had Tremills lived a few years the contract would have been by no means an advantageous one for the defendants; and though the deceased was an old man, and his health appeared somewhat failing, he might have lived a long time.

I am therefore of opinion that the deeds were fair, and that they should not be declared void, and that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Alex. Grant & Son.*
Solicitors for respondent: *J. B. Kidston & Son.*

W. H. M.

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Oct. 12.

GOMM *v.* CHAPMAN.

Health Act 1890 (*No.* 1098), *ss.* 302 *and* 303—*Notice, service of.*

Notices required for the purposes of any Act relating to the public health may be served by post, by registered letter, addressed to the place of business or the residence of the person to whom the notice is addressed.

SPECIAL CASE stated by the chairman of General Sessions for the opinion of the Full Court.

The defendant Chapman in this case was proceeded against by the informant Gomm, who was the town clerk of Footscray, for non-compliance with notices served on him, calling upon him to form a certain street in accordance with the provision of sec. 234 of the *Health Act* 1890. The justices convicted the defendant, and the defendant thereupon appealed to the Court of General Sessions at Melbourne, and the conviction was quashed upon the appeal. From the facts stated in the special case, it appeared that two objections had been taken—the first relating to the sufficiency of the notice itself, and the second that the notice had not been served in accordance with the provisions of sec. 302 of the *Health Act* 1890. The first ground was abandoned at the argument of the special case. The facts relating to the mode of service were admitted, and were as follows:—The defendant resided in Footscray, and carried on business in Melbourne. The notice was posted to the place of business, and was received by the son of the defendant, and an answer was sent by the son and not by the defendant.

Bryant for the informant—The first point as to the sufficiency of the notice has been decided by this Court in the case of *Haines* v. *The Trustees Executors and Agency Co.* (*a*).

[*Cussen*—That case was decided after the appeal in the Court of General Sessions, and it is not now open for the defendant to contest it, and that ground is therefore abandoned.]

No doubt under sec. 302, when the place of residence of the owner is known, service is directed to be made there; but sec. 303 provides that "any notice or order to any council or officer

(*a*) *Ante*, p. 585.

or person which is required for the purpose of any Act relating to the public health may be served by post by registered letter addressed to the office or place of business of such council or officer or person or to the residence of such person." That section clearly makes the service at the place of business a good service. The only object is that he should get notice, and it is immaterial whether he gets it at his residence or place of business. The sections may be inconsistent, but sec. 303 was enacted to cover any defects or difficulties that might have arisen under 302.

Cussen for the defendant—Sec. 302 is specific in its terms, and requires that when the residence of the owner is known, notice must be sent to his residence. It has never been shown that the letter came to his actual notice, and in default of this strict compliance with sec. 302 must be proved. The general provisions of sec. 303, which are taken from another Act altogether, do not override sec. 302. If sec. 303 is to control the mode of service, sec. 302 is utterly useless.

Bryant—The informant should be allowed the costs of these proceedings.

HIGINBOTHAM, C.J. We have no power to deal with the question of costs.

Bryant—Then a party who is successful in getting an appeal against an original order set aside has to pay his own costs?

HIGINBOTHAM, C.J. This Court has no power to deal with costs at all.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HODGES, JJ.]. The first ground relied upon is disposed of by the case of *Haines* v. *The Executors and Trustees Agency Co.* (*b*). The second ground is to be determined by the provisions contained in the latter part of sec. 303 of the *Health Act* 1890, which provides "that any notice or order from any council to any person may be served by post by

(*b*) *Ante*, p. 585.

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registered letter with a like address," and that address refers to the office or to the residence of a person sought to be affected by the notice, "and in proving such service it shall be sufficient to prove that such notice or order was properly addressed and put into the post." It was admitted that the notice in this case was put into the post, and the notice appears to be addressed to the defendant's place of business, and to have been received by the son of the defendant. An objection was urged by Mr. Cussen as to the application of this section to the circumstances of this case; that objection, in our opinion, cannot be allowed. There is no doubt that considerable ambiguity arises from the placing of these two sections together in the Consolidated Act, when such sections relating to the same point were previously contained in Acts passed at different times. It has been contended that this later section (303) taken from the "*Public Health Amendment Act* 1889" being general in its terms, cannot be allowed to over-ride the special provisions of sec. 302, which has been taken from the "*Public Health Amendment Act* 1883." But we think that the provisions of sec. 303 are not necessarily inconsistent with the provisions contained in sec. 302 on this particular point, and that sec. 303 gives power to direct notices in a different way and to different places from those provided by sec. 302. The later Act does not necessarily over-ride the particular modes of service directed in sec. 302. It seems to us to be sufficient if the notice be directed to either of the two places mentioned to the person named. This ground also fails, and in our opinion the conviction was improperly quashed by the Court of General Sessions, and the conviction should stand.

Solicitors for informant: *Gillott, Croker & Snowden.*
Solicitor for defendant: *Hopkins.*

W. H. M.

LYON AND OTHERS *v.* CREATI. F.C.

1892
Oct. 17.

Contract—Reasonable time for delivery—Assignment of work of art.

By a contract for purchase of a printed work known as *The Picturesque Atlas* it was provided that the non-delivery of the publication at any specified date should not release the subscriber from his obligation to take the whole work. The publishers agreed to begin delivery of the work during the year 1886 or following year, and to complete delivery of the series as soon after publication as possible.

Held, that the work must be delivered within a reasonable time, and that the question of what was a reasonable time depended upon the time and manner of publication of the several parts of the work, and the time after publication when delivery of them was tendered.

The contract for the purchase of the work was made by the plaintiffs with the defendant, and was subsequently assigned by the plaintiffs to the Picturesque Atlas Co., who continued to carry out the terms of the contract.

Held, that this contract, though one for a work of art, was not one which had to be executed by the plaintiffs individually, and was a contract capable of being assigned.

SPECIAL CASE reserved by a judge of the County Court for the opinion of the Full Court.

This was an action brought by the plaintiffs, James Lyon, Frank McNeill, Frank Coffee, and Silas Moffet, trading as The Picturesque Atlas Publishing Company, against the defendant, J. F. Creati, to recover the sum of 5*l.* 15*s.*, being the balance due under a contract signed by the defendant for the supply of *The Picturesque Atlas*. The case was heard before Judge Walsh, acting county court judge at Ballarat. The learned judge at the conclusion of the case, reserved by way of a special case under sec. 135 of the *County Court Act* 1890, certain questions for the opinion of the Supreme Court. The defences taken at the trial were:—(1) No sale to the defendant. (2) No delivery of the books. (3) If there was any delivery, it was not within a reasonable time. (4) That the present plaintiffs could not sue, as the contract was assigned to and executed by The Picturesque Atlas Company. (5) That the contract was for a work of art, and could not be assigned. (6) That the plaintiffs must prove that they performed the contract, and delivered the goods under it. The following was the contract under which the books were to be delivered:—

"TO THE PICTURESQUE ATLAS PUBLISHING CO., PUBLISHERS OF *The Picturesque Atlas of Australasia.*

"Please deliver to my address, as given below, the above-described work in 26 parts (paper covers), for which I agree to pay you or your authorised agent 5*s.* for

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each part when delivered at my residence or place of business, each part to contain from 12 to 16 pages.

"1. It is also expressly understood by each subscriber that the non-delivery of the publication at any specified date shall in nowise release the said subscriber from the above obligation.

"2. The publishers on their part agree to begin the delivery of the work during the year 1886 or following year, and will complete the delivery of the series as soon after publication as possible, pledging themselves to a faithful performance of their part of this agreement.

"3. Subscriptions received only for the entire work, no agent being authorised to change the terms of this agreement, to give credit, to receive pay in advance, or to contract any liability for the publishers."

It was proved that the defendant signed the order for the books in November 1885. The plaintiffs subsequently assigned their business to the Picturesque Atlas Co., and after the assignment, in November 1888, Parts Nos. I.-XVIII. were ready for delivery. In November 1888 Part I. of the work was delivered to the defendant, and subsequently, though at what date did not appear, the defendant took two more parts. In April 1890 one of the agents for the company brought the balance of the work, twenty-three parts, and tendered them to the defendant. The defendant then said he would only take one at a time, and refused to take all the numbers. The twenty parts were then left on the premises.

The defendant called no evidence, and on these facts the learned judge reserved for the opinion of the Supreme Court the following questions:—

1. Does the contract require the plaintiffs to deliver the various parts of the work within a reasonable time?

2. Did the plaintiffs fulfil their part of the contract by delivering the various parts of the work in the manner shown by the evidence?

3. Were the plaintiffs bound to publish and deliver the work themselves, or did they sufficiently comply with the terms of the contract by getting the work published and delivered by The Picturesque Atlas Publishing Co. Limited?

4. Was the contract assigned by the plaintiffs to The Picturesque Atlas Publishing Co. Limited? and if so, are the plaintiffs precluded by such assignment from recovering in this action?

5. Was the contract a work of art, and therefore incapable of being assigned?

Madden (with him *Isaacs*) for the plaintiffs—No doubt the first question must be answered in the affirmative, and it becomes a question for the judge to say whether the delivery was made within a reasonable time under the circumstances. No particular time is mentioned, and all the surrounding facts, such as the number of parts to be printed, the nature of the publication, and the various districts in which the delivery was to be made, must be considered. The only remedy the defendant would have would be by action for breach of contract. The plaintiffs may deliver all the parts together.

[HODGES, J. I do not think that they could publish twenty-five parts, and wait till the twenty-fifth part was published, and then take the whole number and deliver them to the defendant in a bundle.]

They undertake to deliver the series as soon as possible after publication.

Counsel referred to the case of *British Waggon and Park Gate Co.* v. *Lea & Co.* (*a*).

There was no appearance for the defendant.

The Court, after hearing the argument in this case, reserved judgment until arguments had been heard in the case of *The Picturesque Atlas Co.* v. *Searle* (*b*), and at the conclusion of the argument in that case delivered judgment.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HODGES, JJ.]. We have heard the arguments in the two cases of *Lyon and Others* v. *Creati* and *The Picturesque Atlas Publishing Co.* v. *Searle*. They are both cases stated by the learned judge of the County Court, presenting questions of law to be answered by this Court. Taking the case of *Lyon and Others* v. *Creati* first, the first question is, "Does the contract require the plaintiffs to deliver the various parts of the work within a reasonable time?" We answer, "Yes"; but it is a mixed question of law and fact whether on the evidence a reasonable

(*a*) 5 Q.B.D. 149. (*b*) *Post*, p. 633.

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time had elapsed. The second question is, "Did the plaintiffs fulfil their part of the contract by delivering the various part of the work in the manner shown by the evidence?" We cannot answer this question, inasmuch as the answer to it depends upon the time and manner of the publication of the several parts of the work, and the time after publication when delivery of them was tendered, sufficient evidence of which is not before us. The third question is, "Were the plaintiffs bound to publish and deliver the work themselves, or did they sufficiently comply with the terms of the contract by getting the work published and delivered by the Picturesque Atlas Publishing Co. Limited?" We answer that the plaintiffs were not bound to publish and deliver the work themselves, and that they sufficiently complied with the terms of the contract by getting the work published and delivered by the Picturesque Atlas Publishing Co. Limited. The fourth question is, "Was the contract assigned by the plaintiffs to the Picturesque Atlas Publishing Co. Limited; and, if so, are the plaintiffs precluded by such assignment from recovering in this action?" We answer that the plaintiffs are not precluded by the assignment from recovering in this case. The fifth question is, "Was the contract for a work of art, and therefore incapable of being assigned?" We answer that the contract, though for a work of art, was not one which had necessarily to be executed by the plaintiffs individually, and therefore it was a contract capable of being assigned. In this case the costs of and occasioned by the hearing of the questions reserved will abide the event of the action in the County Court.

Solicitors for the plaintiffs: *Cuthbert, Wynne, Morrow & Must.*

W. H. M.

THE PICTURESQUE ATLAS CO. LIMITED *v.* SEARLE.

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Oct. 17, 18.

Foreign company—Proof of incorporation—Contract to deliver publication of work in parts—Reasonable time—"Federal Council Act 1886."

Evidence showing that a company carries on business as a company in New South Wales and Victoria, and has offices in both colonies, is *prima facie* proof of the due incorporation of the company in New South Wales, and the company is entitled to sue in Victoria.

The "*Federal Council Act* 1886," enabling the Court to take judicial notice of signatures of certain officials therein mentioned, does not apply to officials in the Colony of New South Wales, and does not enable the Court to receive in evidence certified copies of documents signed by such officials on their mere production.

The plaintiffs entered into a contract to deliver to the defendant a certain work containing forty-two parts, at a price of 5*s.* for each part. One of the conditions of the contract was that non-delivery of the publication at any specified date should not release the defendant from his obligation to take the work. The plaintiffs undertook to begin the delivery of the work in 1886 or the following year, and to complete the delivery of the series as soon after publication as possible, and they pledged themselves to a faithful performance of this part of the agreement. The contract was signed in November 1885. The first part was delivered to and paid for by the defendant on the 6th May 1887. The second part was tendered to the defendant in April 1888, and he refused to take it, and in March 1890 the whole of the remaining parts were tendered to the defendant, and he refused to take them. It appeared that the second part was ready for delivery in March 1887, that the parts up to No. 20 were ready in December 1887, and from No. 20 to No. 30 in December 1888, and the remaining parts in November 1889. The plaintiffs sued the defendant for the price of the remaining forty-one parts.

Held, that the contract required the plaintiffs to deliver the various parts of the work within a reasonable time, and that the plaintiffs did not fulfil their part of the contract by delivering the various parts of the work as set out above, and that therefore they were not entitled to recover.

SPECIAL CASE reserved by a judge of County Court, for the opinion of the Supreme Court.

The plaintiff sued the defendant to recover 10*l.* 5*s.*, balance due under a contract signed by him for the supply to him by the plaintiff of the *Picturesque Atlas*. The contract signed by the defendant was as follows :—

"TO THE PICTURESQUE ATLAS PUBLISHING CO. LIMITED, PUBLISHERS OF *The Picturesque Atlas of Australasia.*

"Please deliver to my address as given below, the above-described work in forty-two parts (paper covers), for which I agree to pay you or your authorised agent 5*s.* for each part when delivered at my residence or place of business, each part to contain from 12 to 16 pages.

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"1. It is also expressly understood by each subscriber that the non-delivery of the publication at any specified date shall in nowise release the said subscriber from the above obligation.

"2. The publishers on their part agree to begin the delivery of the work during the year 1886 or following year, and will complete the delivery of the series as soon after publication as possible, pledging themselves to a faithful performance of their part of this agreement.

"3. Subscriptions received only for the entire work, no agent being authorised to change the terms of this agreement, to give credit, to receive pay in advance, or to contract any liability for the publishers."

The material defences raised were that the plaintiff was not an incorporated company, that the sale of the goods was not within the scope of their deed, and that the delivery of the goods was not made within a reasonable time.

Counsel for the plaintiff put in the following document (Ex. A), a duplicate certificate of the incorporation of the plaintiff company in New South Wales, which was as follows :—

NEW SOUTH WALES TO WIT.

In the Matter of the Picturesque Atlas Publishing Company Limited and In the Matter of the *Companies Act*.

I certify that the company styled "The Picturesque Atlas Publishing Company Limited" is incorporated, and that the said company is a limited company.

Dated at Sydney the 15th day of February 1886.

E. G. WARD,
Registrar for Joint Stock Companies.

[Endorsed.]
A. F. B.

This is the certificate of incorporation, marked A. F. B., annexed to the statutory declaration of Alfred Floyd Brown, taken before me at Sydney this 9th day of March 1891.

GEORGE F. BURCHER,
Notary Public. L.S.

This document was objected to by counsel for the defendant on the ground that proof must be given that the person signing the certificate was the registrar under the *Joint Stock Companies Act*, and that the Court would not take judicial notice of the signature of the registrar of joint stock companies under the 6th section of the "*Federal Council Evidence Act* 1886." (Ex. B), a certified copy by the Registrar-General of New South Wales, acting as

registrar of joint stock companies, of the certificate of incorporation of the plaintiff company, which was as follows:—

New South Wales,
Certificate of Incorporation, No. 1596.

NEW SOUTH WALES TO WIT.

In the Matter of the Picturesque Atlas Publishing Company Limited and In the Matter of the *Companies Acts* 1874 and 1888.

I certify that the company styled "The Picturesque Atlas Publishing Company Limited" is incorporated, and that the said company is a limited company.

Dated at Sydney this 15th day of February 1886.

E. G. WARD,
Registrar-General,
Acting as Registrar of Joint Stock Companies.

I certify that the above contains a true copy of the original certificate of incorporation of the Picturesque Atlas Publishing Company Limited as filed in the office of the Registrar-General, Sydney, and numbered 1596, and that the said company was duly incorporated on 15th February 1886.

Dated at Sydney this 12th day of December 1890.

CHARLES PINKS, L.S.
Registrar-General,
Acting as Registrar of Joint Stock Companies.

This document was also objected to by the counsel for the defendant. (Ex. C), a certified copy of the memorandom of association and articles of association of plaintiff company; (Ex. D), contract between the parties; (Ex. E), list of the company's patrons. The following evidence was given by an expert in the law of New South Wales, admitted as a barrister of the Supreme Court of that colony:—

"I am acquainted with the law of New South Wales relating to incorporated companies. The mode of proving the incorporation of a company is by a certified copy of the certificate of incorporation certified by the Registrar-General, who acts as the registrar of joint stock companies, which is received in New South Wales as conclusive proof that all the requisites for incorporation have been complied with. At the time of the registration a duplicate of the certificate of incorporation is given to the company. Exhibit A is such a duplicate certificate, and the mere production of the document would be received as conclusive proof of the incorporation of the company mentioned in it. Exhibit A is a duplicate original of the certificate of incorporation. Exhibit B is a certified copy by the Registrar-General, acting as registrar of joint stock companies, of the certificate of incorporation of the plaintiff company, and would of itself be received in New South Wales as proof of the incorporation of the plaintiff company. I do not know the writing of the Registrar-General. Exhibit C is a certified copy of the memorandum of association of plaintiff company, and such a copy is receivable in evidence in New South Wales."

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Cross-examined:—

"I was not examined in England on the law of New South Wales, but decisions of the Privy Council relating to the law of New South Wales I was supposed to know. My knowledge of New South Wales law is confined to what I have read in this colony. I have never practised in New South Wales. I can't recall to memory the name of any Act passed in New South Wales last year or this year. I set myself up as an expert in the law of New South Wales. The *Companies Act* has been amended, but not repealed. I am not positive that the *Companies Acts* 1874 and 1888 have not been amended. I do not know of my own knowledge if a registrar of joint stock companies has been appointed, but under the Act the Registrar-General was authorised to act as registrar of joint stock companies till one was appointed. For six months about 1888 I studied the law of New South Wales."

The manager of the plaintiff company also gave evidence that the company carried on business in New South Wales as well as in Victoria, and had an office both in Sydney and Melbourne. The other material evidence in the case showed that the defendant signed the above contract on the 21st April 1886, and that on the 6th of May 1887 he took delivery of one number of the work, and paid 5*s*. for it, and then said that he would not take any more. In April 1888 the second number of the work was tendered to him, and he refused to accept it, saying that he had only signed for one part, and did not intend to take any more, and the delivery agent took the number away. On 6th March 1890 the whole of the remaining forty-one parts of the work were tendered to the defendant. He refused to accept them, but they were left on the counter in his shop. It further appeared by the evidence that the second part of the work was ready for delivery in March 1887, parts up to XX. in December 1887, parts up to XXX. in December 1888, and forty-two parts in November 1889, but only a limited number of Part XLII. One witness, in cross-examination, said that all the parts could have been issued in 1887 if the printing plant had been large enough. At the conclusion of the case the learned judge reserved for the opinion of the Supreme Court the following questions:—

1. Is the evidence tendered in this case for the plaintiff company sufficient proof that the plaintiff company was duly incorporated in New South Wales?

2. The plaintiff being a company trading in Victoria, is it entitled to sue in Victoria on proof that it is registered in New South Wales?

3. Does the "*Federal Council Evidence Act* 1886" enable me o take judicial notice of the signatures of the certain officials erein mentioned of the colony of New South Wales?

4. If so, do the words "Registrar-General" in sec. 6 of the id Act include the Registrar-General acting as registrar of joint ock companies?

5. Does the said Act enable me to receive in evidence the ocuments put in and marked respectively A, B, and C, being the rtificate of incorporation of the plaintiff company, the certified opy by the Registrar-General acting as registrar of joint stock ompanies of the certificate of incorporation of the plaintiff, and a rtified copy of the memorandum of association and articles of ssociation of the plaintiff company.

6. Does the contract require the plaintiff to deliver the various arts of the work within a reasonable time?

7. Did the plaintiff fulfil this part of the contract by delivering he various parts of the work in the manner shown by the ridence?

Madden (with him *Isaacs*) for the plaintiff—The fact that the ompany carries on business as a company in New South Wales nd Victoria, and has offices in the two colonies, is some evidence o go to the jury of the company being duly incorporated in New outh Wales: *The Queen* v. *Langton* (*a*). The company is entitled o sue in Victoria: *Henriques* v. *Dutch and West India Co.* (*b*); *ervice* v. *Bateman* (*c*); *Bulkeley* v. *Schultz* (*d*); *Newby* v. *Von ppen* (*e*).

[*J. W. Smith*, for the defendant, said that he did not propose o argue that the company could not sue.]

The colony of New South Wales did not form part of the ederal Council, and the Federal Council Acts do not apply; and urther, the Acts only apply to federal purposes, and do not affect rivate rights. It is not necessary to argue questions 4 and 5. he defendant received part of the publication, and he cannot epudiate the contract; his remedy is by action to recover damages

(*a*) 2 Q.B.D. 296.
(*b*) Raym., Ld., p. 1535.
(*c*) 6 App. Cas. 386.
(*d*) L.R. 3 P.C. 764.
(*e*) L.R. 7 Q.B. 293.

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by reason of non-delivery within a reasonable time. The defendant never rescinded the contract.

[HIGINBOTHAM, C.J. Is not the refusal to accept the balance of the parts evidence of intention to rescind?]

Not under the circumstances of this case; intention to rescind should have been shown before the tender of all the parts of the publication was made. The delivery must be made within a reasonable time, but the question "what is a reasonable time" depends upon various circumstances—the nature of the publication, the number of subscribers, for it would be impossible to deliver the publication in different districts to thousands of subscribers at the same time. The publication was got out as fast as possible; of course if the printing plant had been larger it would have been published sooner. These are all facts for a jury, and there is evidence which would justify the conclusion that under the circumstances the publication was delivered within a reasonable time.

When the plaintiff tendered the second part, and the defendant refused to accept it, no doubt he could have been sued for breach of contract, but the plaintiff was entitled to complete the work and sue on the contract. There was no necessity to tender part by part. The plaintiff had to deliver the "publication," not the publication in parts as they came out: *Bowerman* v. *Green* (*f*).

Counsel referred to *Hochster* v. *Delatour* (*g*); *Rosel* v. *Adam* (*h*).

J. W. Smith for the defendant—The contract required the plaintiff to deliver the parts within a reasonable time: *Ellis* v. *Thompson* (*i*). The evidence clearly points to a most unreasonable delay, and the defendant was justified in rescinding the contract, and refusing to accept.

Counsel was stopped by the Court.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HODGES, JJ.]. We have already dealt with very similar questions in the case of *Lyon* v. *Creati* (*k*), and we have now to deal with the particular questions raised in this case. The first question is, "Is the evidence

(*f*) New Zealand App. Cas., Vol. IX., 157.
(*g*) 2 E. & B. 678.
(*h*) 2 V.L.R. (L.) 170.
(*i*) 3 M. & W. 445.
(*k*) *Ante*, p. 629.

endered in this case for the complainant company sufficient proof hat the plaintiff company was duly incorporated in New South Wales?" We answer, Yes. The second question is, "The plaintiff being a company trading in Victoria, is it entitled to sue in Victoria on proof that it is registered in New South Wales?" Answer, Yes. The third question is, "Does the '*Federal Council Evidence Act* 1886' enable me to take judicial notice of signatures of certain officials therein mentioned of the colony of New South Wales?" Answer, No. The fourth question is, "If so, do the words 'Registrar-General' in sec. 6 of the said Act include the Registrar-General acting as registrar of joint stock companies?" Answer, See answer to previous question. The fifth question is, 'Does the said Act enable me to receive in evidence the documents put in and marked respectively A, B, and C, being the certificate of incorporation of the plaintiff company, the certified copy by the Registrar-General acting as registrar of joint stock companies of the certificate of incorporation of the plaintiff company, and a certified copy of the memorandum of association and articles of association of the plaintiff company?" Answer, No. The sixth question is, "Does the contract require the plaintiff to deliver the various parts of the work within a reasonable time?" Yes; but it is a mixed question of law and fact whether on the evidence a reasonable time had elapsed. The seventh question is, "Did the plaintiffs fulfil their part of the contract by delivering the various parts of the work in the manner shown by the evidence?" Answer, No. In this case the costs of and occasioned by the hearing are awarded to the defendant.

Solicitors for the plaintiff: *Westley & Dale.*

Solicitor for the defendant: *Gill.*

W. H. M.

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May 25, 26, 27, 30, 31.
July 22.

Holroyd, J.

IN THE WILL OF FRANCIS THOMAS KEY, DECEASED.

Will—Testamentary capacity—Onus of proof.

The onus is on the party propounding a will of satisfying the Court of the testamentary capacity of the testator. Where no evidence is given throwing doubt upon the competency of the testator, the Court will be satisfied on proof of due execution of the will, as the presumption of sanity arises from the performance of an apparently rational act; but when the sanity of the testator is at issue, and evidence both ways has been given, the will will not be held valid merely because the Court or jury is not convinced that the testator was incompetent.

ORDER *nisi*, calling on the widow and four eldest children of Francis Thomas Key, deceased, to show cause why probate of his will should not be granted to the Trustees Executors and Agency Company Limited, the executor appointed by the will.

Higgins and *Woolf* for the applicant.

F. G. Duffy for the caveators.

Cur. adv. vult.

July 22.

HOLROYD, J. Order *nisi*, calling upon Ellen Key, the widow, and Frances Mary Robinson, Mercy Ellen Maria Key, Isabel Sarah Emily Key, and Alicia Key, the four eldest children of the deceased Francis Thomas Key, to show cause why probate of an alleged will of the said deceased, dated the 14th day of November 1891, exhibited and filed in this Court on the 23rd of February 1892, should not be granted to the Trustees Executors and Agency Company Limited, the executor named in and appointed by the said alleged will.

I think that when the instrument propounded was executed, the deceased was not of sound and disposing mind, and that he had not been competent to make a will for some weeks previously. I have no reason to doubt the accuracy of Mr. Speed's account of what passed at the time of the execution of this instrument, but I think he may have been easily deceived as to the testator's capacity, particularly when he had received assurances from intimate friends of Mr. Key that he was in a fit state to make his will. If kept free from drink for a while, even for a few hours, and braced up a

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little, Key may have appeared to understand easy matters of business, when he was not called upon to exercise any great or prolonged mental effort; but he was incapable in my opinion of entertaining those considerations with respect to business generally, and especially with regard to the making of a will, which he ought to have entertained. His memory was defective, and he was unequal to carrying out any special arrangement for himself. On several important occasions, shortly before the date of the instrument, he exhibited a lack of comprehension, an indecision, and a want of will, combined with obstinacy, which are hardly consistent with anything but a mind deranged. Every sensible thing that he did had to be suggested to him. For the power of attorney which he executed, and which Speed prepared for him, to enable Collas to manage his business, he gave no instructions himself. Macintire spoke for him. Macintire and Collas had planned the whole arrangement between them beforehand. The terms on which he was to separate from his wife were proposed to him, almost forced upon him; and, to use Mr. King's language, the contents of the deeds of separation and settlement were drummed into him. He was prompted to go away to Darcy's, he was prompted to place himself in the inebriate asylum. I doubt if of his own free will he would have ever submitted himself to the discipline. To direct the disposition of all his property to his two younger children required no mental exertion. That he was exceedingly obstinate in adhering to his resolution to deprive his other children of all share in his property, when he was urged to permit them to participate, only shows how unnaturally perverted his mind had become. I can attribute this obstinacy only to delusion. He believed that his four eldest children had taken sides with their mother against him. There was not a scrap of evidence of any unfilial act or of any unkind feeling on their part towards him. His quarrels with his wife were obviously the result of a weakening of his mind through continually soaking himself with liquor. Whenever he was entirely sober, whenever he recovered from the effects of a hard drinking bout, his animosity towards his wife ceased, and he exhibited many tokens of being an affectionate husband.

I have not formed my conclusion without doubt, for there was a mass of evidence, and as contradictory as often happens in cases of

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this kind. But it lies upon the party propounding a will to satisfy the Court of the capacity of the testator, and unless that be done, the Court must pronounce that the instrument is not entitled to probate: *Baker* v. *Batt* (*a*); *Barry* v. *Buttin* (*b*). To satisfy the Court, it will ordinarily be sufficient to prove the due execution of the will, as the presumption of sanity arises from the performance of an apparently rational act, and the absence of any evidence, or evidence strong enough, to throw doubt upon the competency of the testator. But when the sanity of the testator is at issue, and evidence has been adduced on both sides, the will is not to be held valid merely because the Court, or the jury, if there be a jury, is not convinced that the testator was incompetent; but on the contrary the instrument cannot be established as a valid will unless the Court or jury is convinced of his competency: *Sutton* v. *Sadler* (*c*). Where a will is, like the one propounded, inofficious, that is to say, not consonant with the testator's natural affection and moral duties, that circumstance in itself arouses a suspicion that the testator did not grasp the full bearing of his act, and is of great weight when combined with other circumstances indicative of failing intellect.

The order *nisi* will therefore be discharged, but I shall direct that the costs both of the executor and of the caveators, as between solicitor and client, be paid out of the estate.

Solicitors for applicant: *Briggs & Snowball.*
Solicitors for caveators: *Gavan Duffy & King.*

A. J. A.

(*a*) 2 Moo. P.C., *per* Parke, B., p. 319. (*b*) *Ib.*, at p. 483.
(*c*) 3 C.B. (N.S.), at p. 94, *et seq.*

IN THE WILL OF HANNAH McLURE, DECEASED.

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July 21.

Hodges, J.

Practice probate—Intestacy—Next of kin—Curator.

Though the next of kin, if a fit person, is entitled to administration of an intestate's estate in preference to the Curator of Intestate Estates, yet where he has requested the Curator to apply for administration, and the Curator has done so, he cannot subsequently demand as of right that the Curator should be superseded and administration granted to him.

MOTION for letters of administration of the estate of Hannah McLure, deceased, intestate, to Henry McLure, her eldest son.

In this case the affidavits showed that a rule to administer the intestate's estate had been granted to the Curator of Intestate estates, who had been put in motion by the present applicant and his sister, on the ground, as stated by the sister, without objection by the brother, that he was of intemperate habits. The Curator accordingly lodged a caveat against the present application, but on the matter coming on before A'BECKETT, J., he suggested that the Curator should withdraw his caveat, and on the application coming on for hearing, should state his objections thereto. This course was adopted, and the objections stated by the Curator were that Henry McLure, the present applicant, came with his sister to him, and requested him to take out administration of the intestate's estate, as he was of drunken habits and incapable of properly administering, and he accordingly did so; and now, against the wishes of his brothers and sisters, he wished to have the Curator superseded; and that, if such a course were permitted, it would be making a mere shuttlecock of the Curator.

Chomley for the curator.

Bryant for the applicant.

HOLROYD, J. If those facts are true, what have you to say, Mr. Bryant?

Bryant—The Curator has no right to administer unless the persons primarily entitled to administration have refused.

[HOLROYD, J. The Court is not bound to grant administration to the eldest son when his other brothers object. Your client is

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not entitled, as of right, to administer; besides, there is the statement that he is of drunken habits.]

The statement as to his habits is very vague, and would be disputed. The advertisement of intention by the applicant to apply was published on 21st May, and administration was not granted to the Curator till 30th May, although it was on the 9th May when the present applicant requested him to apply. His delay is partly answerable for the present application. The Curator has no right to apply till the next of kin have all been excluded; nor can other persons entitled delegate their rights to the Curator: *Re Gallogly* (*a*).

HOLROYD, J. The next of kin applying for administration must be a fit person, and if such a fit person applies, he is entitled to administration in preference to the Curator; but if he requests the Curator to apply, and the Curator does, I do not see that he has any right to object afterwards. It would be a farce for a man to ask the Curator to take out administration, and then come the next day and ask for it himself. The applicant is trifling with the office of Curator, and if there were no other circumstances I should have no confidence in him. His drunkenness and behaviour generally show, in addition, that he is not a fit person to be entrusted with administration. I refuse the application with costs.

Solicitor for applicant: *Budd.*

Solicitors for Curator: *Weigall & Dobson.*

A. J. A.

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Holroyd, J.

IN RE GEORGE CHAPMAN, DECEASED.

Practice probate—Affidavit—Description of deponent—Judicature Rules—Order XXXVIII., r. 8—*Order LXVIII., r.* 1.

Though Order XXXVIII., r. 8, requiring that every affidavit shall state the description of the deponent, does not apply to matters in the probate jurisdiction, it is advisable that the description should be stated, and the Probate Court will require it.

MOTION for probate of the will of George Chapman, deceased.

(*a*) 5 A.J.R. 49.

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The testator had signed his name in the testimonium clause, and the affidavit of one of the witnesses, explaining how that came to be done, gave the name and residence of the witness, but did not give his description, which, however, was given in the affidavit of the applicants in support of the motion.

Starke for the motion—The *Judicature Rules*, Order XXXVIII., r. 8, provide that every affidavit shall state the description and true place of abode of the deponent, but it is submitted that those rules do not apply to affidavits in probate matters, for Order LXVIII., r. 1, excepts from those rules the practice or procedure in proceedings in probate cases. Molesworth, J., however, held that they do apply to such matters: *Re O'Brien* (*a*); but Your Honor held differently in *Re Hunter* (*b*). Prior to the *Judicature Act*, sec. 379 of "*The Common Law Procedure Statute* 1865" (No. 274) provided what must be stated in an affidavit.

HOLROYD, J. The Probate Rules state that every application for probate shall be supported by an affidavit or affidavits setting forth the name and residence of each executor, and of each of the subscribing witnesses to the will, saying nothing about their description. That is properly set out in the affidavit of the executors. The question then is whether in every affidavit in a probate matter the description of the deponent should be given. My impression is that the *Judicature Rules* do not apply to such matters in the probate jurisdiction, but I think it is advisable that it should be done, and I think it ought to be done. I will make the grant as soon as the affidavit is re-sworn.

Solicitors: *Weigall & Dobson.*

A. J. A.

[NOTE.—The practice of the Court in its probate jurisdiction is now provided for by sec. 14 of the *Administration and Probate Act* 1890 (No. 1060), which provides that:—

"The practice of the Court in its probate jurisdiction shall, except where otherwise provided by this Part of this Act, or by *Rules of the Court for the time being in force in that behalf*, be regulated, so far as the circumstances of the case will admit, by the practice of the Court in its ecclesiastical jurisdiction," etc.

(*a*) 11 V.L.R. 342. (*b*) 12 A.L.T. 29.

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The words in italics being substituted for the words "the rules to be from time to time made under this Act" in the previous Act of 1872, No. 427, sec. 16.

Quaere, whether this alteration was not made to meet the decision in *Re O'Brien*, or, at all events, to remove any doubt as to the *Judicature Rules* applying.—ED.]

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HANLEY *v.* HANLEY.

Husband and wife—Marriage Act 1890 (*No.* 1166), *ss.* 74 *and* 86—*Dissolution of marriage—Adultery of petitioner—Connivance of respondent at petitioner's adultery—Condonation by respondent of petitioner's adultery—Discretionary bar.*

In an undefended suit for dissolution of marriage brought by the wife against the husband on the grounds of desertion, habitual drunkenness, and cruelty, these grounds were proved, but it appeared that after one of the times on which the husband had left the petitioner without the means of support, she had gone to a brothel and lived there for some months as a prostitute—that her husband knew of this, and visited her there to endeavour to get from her money, the proceeds of the life she was leading, and that subsequently he and she had again lived together for some months as man and wife.

Held, that as the husband, who was the person wronged by her adultery, connived at it, and afterwards condoned it, the Court should not exercise the discretion which it had under sec. 86 of the *Marriage Act* 1890 (No. 1166) by refusing the petitioner the relief asked.

Where there is any doubt as to the date on which a marriage took place, the Court in making a decree *nisi* for dissolution of marriage will not require the date to be inserted in the decree.

PETITION by Sarah Jane Hanley against her husband, Michael Hanley, seeking a dissolution on the ground that the respondent had without just cause or excuse wilfully deserted the petitioner, and without any such cause or excuse left her continuously so deserted during three years and upwards, and on the grounds that the respondent had during three years and upwards been an habitual drunkard, and habitually left the petitioner without the means of support, and habitually been guilty of cruelty towards her.

The suit was undefended.

During the taking of the petitioner's evidence, it appeared that her husband had in 1887 left her without means in the house in

which they had been living, and that within a day or two the furniture in the house had been seized by its owners. She stated that she then went to live with a woman in Napier Street, Fitzroy, for a period of some months; and, on the learned judge asking her what she did during this time for a living, she stated that she had been a prostitute. It further appeared from her evidence, corroborated by that of other witnesses, that while she was a prostitute her husband sometimes visited her at the house—that he knew that it was a brothel, and that his object of visiting her on these occasions was to obtain money from her. It also appeared on the evidence that after this she and her husband had again lived together as man and wife for some months, when he finally deserted her.

Agg for the petitioner—Assuming that the case of the petitioner, as stated in her petition, is proved, there remains her admission that she has committed adultery. Under sec. 86 of the *Marriage Act* 1890 (No. 1166), the Court is not bound to pronounce a decree of dissolution if it find that the petitioner has during the marriage been guilty of adultery. It gives the Court a discretion to grant a decree notwithstanding the petitioner's adultery—in some cases, at all events—and if any such case could be stronger than another it is this case, where the husband was not only aware of her living as a prostitute, but connived at it, and only desired to obtain a portion of the proceeds of her shame. Further, the husband condoned her adultery by afterwards living with her as man and wife, and the Court will have regard to such condonation in exercising its discretion: *Weeding* v. *Weeding and Rose* (*a*), in which case a divorce was refused on the ground of the petitioner's adultery, but the petitioner afterwards obtained a divorce on alleging fresh acts of adultery between his wife and the co-respondent, after the hearing of the previous case (*b*). It is doubtful whether sec. 86 of the Act applies to a case of a petition for a divorce under sec. 75, for sec. 75 provides that in all cases under that section, except where the petitioner's own habits or conduct induced or contributed to the wrong complained of, the Court shall pronounce a decree.

(*a*) 13 V.L.R. 215. (*b*) 16 V.L.R. 596.

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HOOD, J. This is a petition by a wife against her husband, claiming a divorce on the ground of desertion for three years and upwards, and on the grounds that he has been an habitual drunkard, and habitually left her without the means of support, and habitually been guilty of cruelty towards her. I think it is clear that the husband did desert the wife, and did ill-treat her, and that he was a drunkard; and if the case stopped there, I should have felt no difficulty about it. But the Legislature has placed upon the Court a duty, and given it a discretion, where it appears that the petitioner, whether husband or wife, has been guilty of misconduct. The general rule is that the discretion should be exercised against the petitioner if nothing else appears. In this case, however, though with considerable hesitation, I propose to grant the relief for this reason. The husband is wronged by this misconduct, and it is for his protection, to a great extent, that the Legislature has given this power to the Court, and so far from objecting to her behaviour, he went to get money, the proceeds of the life which he knew she was living, and afterwards condoned it by living with her again. I therefore propose to grant an order *nisi*, and I think, judging from what the husband said when the petition was served on him, there is no reason why it should not be with costs.

Order nisi, with costs.

Sept. 30.

Motion to vary the decree as settled by the Chief Clerk. The date of the marriage alleged in the petition, and verified by the affidavit of the petitioner, was 12th June 1880. The petitioner, in giving her evidence in the box, said that she had been thinking the matter over since, and she believed the marriage was on 12th June 1879. The Chief Clerk, in settling the decree, insisted on making the decree dissolving the marriage between the parties of the 12th June 1879, and so settled the decree.

Agg in support of the motion—Since the hearing, and because of the doubt raised as to the real date of the marriage, the petitioner's proctors sent to Adelaide, and have now obtained a certificate of the Registrar-General, containing an exact copy of the

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entry in the register of the marriage, but which did not have a date, being thus, "the 12th day of June," and headed "1877," and the Registrar said that, by virtue of its position in the book, the marriage must have taken place in 1877. It is submitted that as there is a doubt as to date, but no doubt as to the marriage, the Court should decree the marriage to be dissolved, leaving out the date.

HOOD, J. Under the circumstances I think you are entitled to have the date struck out of the decree as settled.

Solicitors: *Wisewould, Gibbs & Wisewould.*

A. J. A.

WILLIAMSON *v.* TAIT AND OTHERS.

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August 4.

October 4.

Mortgagor and mortgagee—Exercise of power of sale—Tender—Instruments Act 1890 (*No.* 1103), *s.* 210.

The plaintiff lent to a gold mining company the sum of 350*l.* secured by a mortgage of the company's plant. The plaintiff also held the bonds of the defendants (the directors of the company) as collateral security for payment of the said 350*l.* The company made default, and the plaintiff then exercised his power of sale, but the contract of sale was not enforceable as it was not in writing. After this sale had been effected, but before it was completed, the mortgagor tendered the sum secured by the mortgage to the plaintiff, but the plaintiff refused the tender on the ground that it was too late, as he had then found a purchaser. Afterwards, through no default of the plaintiff, but by the fault of the company mortgagor, the sale went off. The plaintiff then sued the defendants on their bonds, and the defendants pleaded as an answer to the plaintiff's claim the tender by the mortgagor, and refusal to accept it by the plaintiff.

Held (A'BECKETT, J., *dissentiente*), that the tender was too late, that although the contract of sale was not enforceable, yet the property passed by it, that it was a valid sale of specific chattels, and the defendants were not discharged by the tender from the obligations on their bonds.

SPECIAL CASE stated by Hood, J.

The action was a consolidated one on certain bonds executed by the defendants to the plaintiff to secure the payment of 350*l.*, lent by the plaintiff to the Queen's Jubilee Gold Mining Company Limited on a mortgage to the plaintiff of the company's plant. Both the plaintiff and the defendants were directors of the company. The plaintiff advanced to the company the sum of 350*l.*, to be

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secured by a bill of sale over the company's plant, in addition to a bond signed by the directors for the amount as collateral security. The company made default, and the plaintiff sold his interest in the plant specified in the mortgage to one Orme. This sale was a merely verbal one, and after it had taken place, but before its completion, the company tendered to the plaintiff the amount of their debt due to the plaintiff, but the plaintiff refused to accept the tender on the ground that it was made too late, as he had already agreed to sell to Orme. The sale went off, and was never completed, and the plaintiff then brought the present action, and the defendants pleaded in answer to it the tender by the mortgagor. The learned primary judge found as facts that the sale to Orme was a *bonâ fide* sale, but not in writing; that the tender was a good tender; and that the sale went off through no default of the plaintiff, but through the fault of the company. The question to be decided was whether the tender by the mortgagor of the money due to the plaintiff was an answer to the plaintiff's claim in the action.

Bryant and *Williamson* for the plaintiff—The tender was too late, as it was made after a valid sale. Although that sale was not enforceable it was a valid one, because it was made *bonâ fide*. The fact that the contract for sale was not in writing is, under the 17th section of the *Statute of Frauds* (sec. 210 of the *Instruments Act* 1890), important only as a matter of evidence of the contract; the property passed all the same to the purchaser. A third person who is not a party to a contract cannot raise the question whether or not that contract is enforceable between the immediate contracting parties.

They cited *Maddison* v. *Alderson* (*a*); *Lucas* v. *Dixon* (*b*); *Watson* v. *The Royal Permanent Building Society* (*c*); *Evans* v. *Duncan* (*d*); *Jenkins* v. *Jones* (*e*).

Goldsmith for the defendants—The mortgagor has a right to redeem at any time until the mortgagee has exercised the power of sale, and the exercise of that power means that the sale is to be

(*a*) 8 App. Cas. 467.
(*b*) 22 Q.B.D. 357.
(*c*) 14 V.L.R. 283, at p. 291.
(*d*) 1 Tyrw. 283.
(*e*) 2 Gif. 99.

one effected by an enforceable, not an imperfect, contract. If it is held otherwise, then the mortgagor will be held under a continuing liability for all time at the mortgagee's option by the fact that the mortgagee may at any time enter into a contract of sale which is not enforceable.

Bryant in reply cited *Simmons* v. *Swift* (*f*).

Cur. adv. vult.

HIGINBOTHAM, C.J. This is a consolidated action on certain bonds executed by the defendants to the plaintiff to secure the repayment of 350*l.* lent by the plaintiff to the Queen's Jubilee G. M. Co. Ltd. on a mortgage to the plaintiff of the company's plant. The question reserved by the learned judge for the determination of this Court is whether the defendants were discharged from their obligations on their bonds by a tender by the mortgagor to the mortgagee of the plant of the amount due under the mortgage. The tender, which has been found to be a good tender, was made after default, and after the plaintiff had effected an immediate sale of his interest in the plant specified in the mortgage; a sale found to be a *bona fide* sale, but not in writing, to one Orme, acting for the Harrietville Co. This sale was never completed. Orme refused to complete in consequence of the resistance offered by the Queen's Jubilee Co. to his taking possession. The judge has found that the sale went off through no default of the plaintiff, but by the fault of that company. The plaintiff refused the tender on the ground that it was made too late, as he had then found a purchaser.

On this state of facts it has been contended for the defendants that the mortgagor the Queen's Jubilee Co. had a right to redeem the mortgage at any time until an enforceable contract for the sale of the plaintiff's secured interest in the plant had been made; that no property passed to the purchaser under the verbal contract between the plaintiff and Orme, and that therefore the tender was in time. For the plaintiff, on the other hand, it has been argued that the contract, though not enforceable until the evidence required by the 17th section of the *Statute of Frauds*

(*f*) 5 B. & C., at p. 862.

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(corresponding with the 210th section of the *Instruments Act* 1890) should be forthcoming, was a valid subsisting sale of specific chattels, by which the property passed to the purchaser, and that, therefore, the tender was too late. The more recent decisions on the 17th section of the *Statute of Frauds* bear out the plaintiff's view. According to the earlier decisions, founded upon the marked difference of language between the 4th and the 17th sections of the Statute, a writing was held to be only necessary to evidence the contract under the 4th section, while under the 17th section it was held that a writing was necessary to constitute the contract, and that the contract was void so long as it remained unwritten. Lord Blackburn, in *Maddison* v. *Alderson* (*g*), observes:—

"I think it is now finally settled that the true construction of the *Statute of Frauds*, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction."

Bowen, L.J., in *Lucas* v. *Dixon* (*h*), cites and states his concurrence in this view of Lord Blackburn. See also, *per* Williams, J., in *Bailey* v. *Sweeting* (*i*), and *Brittain* v. *Rossiter* (*k*). I think we are bound to defer to the testimony of these high authorities as to the final settlement of the question of the true construction of an English Act of Parliament which is also in force in precisely the same terms in Victoria. Then, if this contract was a valid contract, notwithstanding sec. 210 of the other Act, and although it was not enforceable between the parties, by reason of its failure to comply with the terms of that section, the property in the plant vested immediately at common law in the vendee: See *Tarling* v. *Baxter* (*l*), where Bailey, J., says at page 364:—

"The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow."

And in *Seath* v. *Moore* (*m*) Lord Blackburn said:—

"A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England, to change the property."

(*g*) 8 App. Cas., at p. 488.
(*h*) 22 Q.B.D., at p. 360.
(*i*) 9 C.B. (N.S.) 843.
(*k*) 11 Q.B.D. 123.
(*l*) 6 B. & C. 360.
(*m*) 11 App. Cas. 370.

It has not been questioned that if the tender was made after the property had passed by a valid, though not enforceable, contract of sale, the tender was too late; but it has been contended that where the price is 10*l.* or upwards the property does not pass under a contract of sale until acceptance, or unless there has been part payment, or a memorandum in writing. This contention is directly in conflict with the recent authorities. If there has been default, followed by a valid though not enforceable sale by the mortgagee changing the property, a tender by the mortgagor is, in my opinion, clearly too late, and is a bad tender. The mortgagor, on making a valid tender, is entitled to receive from the mortgagee, not merely possession of the goods, but the goods themselves free from any charge or encumbrance. In this case the mortgagee could not, at the time of tender, return the plant to the mortgagor, as the property had passed to the purchaser, and remained in the purchaser until the contract became liable to be rescinded by his refusal to complete. The mortgagee, after default and before tender, exercised the power of sale given to him by the mortgage. I think that he had a right to do this, and that he was not deprived of that right by the fact that he could not enforce the sale against the will of the purchaser. My answer to the question reserved is, that the tender of the money in this case is not an answer to the claim of the plaintiff, and that the defendants are not discharged by the tender from their obligations on their bonds.

HOOD, J. In my opinion the tender of the money affords no answer to this action. The plaintiff, at the time the tender was made, had sold the chattels, the subject-matter of the mortgage, and the legal property therein had by that sale passed out of him. The sale was complete both in law and in equity, and the only thing wanting was the legal evidence of it, but the plaintiff as mortgagee could do nothing more in order to carry out his power of selling. In fact, as the articles in this case were chattels, all that had to be done by the plaintiff in order to complete the contract on his part was to give delivery, and this he attempted to do, but was prevented by the acts of the mortgagors. It is conceded that a mortgagor's right to redeem is extinguished when the mortgagee has duly exercised his power of sale, and in my

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opinion a mortgagee has duly exercised that power when he has *bonâ fide* sold even verbally and without satisfying the requirements of the *Statute of Frauds;* at all events when, as here, the property in the goods has thereby passed out of him. It may of course very well be that if the sale go off because of the mortgagee's default in not securing the proper binding evidence of the sale, and if by reason thereof the mortgagor should sustain any injury, he would have his remedy by action for damages. But I cannot see any reason for extending his remedy further, and in a case where he is not really hurt enabling him by means of the *Statute of Frauds* to prevent the two parties to a *bonâ fide* contract from carrying it out when they are both willing to do so. Moreover, the defendants' view places, I think, too onerous a burden upon a mortgagee. According to their contention there might be a contract in writing for the sale of the mortgaged property, and yet the mortgagee be responsible to the mortgagor for redemption if there should be some flaw in the writing which made it insufficient within the *Statute of Frauds*, although that flaw be unknown to the parties to the contract, and be one of which, even if known, neither would take advantage. If the mortgagor is entitled to redeem at any time until there is a legally enforceable contract his right would depend, not upon the sale itself, but upon the evidence of it which may come into existence at any time before action, and I cannot think that this is correct. Under circumstances like the present it appears to me that the time when the right to redeem is lost should be fixed by the act of the mortgagee in *bonâ fide* selling and not by any reference to the time when the requirements of the *Statute of Frauds* may have been complied with. It was contended for the defendants that, inasmuch as the power of sale was only given in order to enable the mortgagee to obtain his money, he ought not to exercise that power when he could get his money otherwise, and that as in the present case the plaintiff had possession of the goods mortgaged, he should have given them up to the mortgagors at the time the tender was made. But the answer seems to me to be that at the time of the tender the mortgagee had duly sold, and the legal property in the goods had passed to the purchaser, and therefore though the vendor had possession yet he had no right to do anything with those goods but deliver them to

their true owner. Nor is it correct as contended that the plaintiff occupied the position of trustee for the mortgagors—

"A mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit to enable him the better to realise his debt. If he exercise it *bonâ fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud":

Warner v. *Jacob* (*n*). And

"if there was a *bonâ fide* sale made under that power it would be utterly immaterial how it was carried out, the only question being whether it was a *bonâ fide* sale or not":

Thurlow v. *Mackison* (*o*). In the present case the power of sale had been *bonâ fide* exercised prior to the tender of the money, and no authority has been cited to show that the mortgagors are entitled to compel the mortgagee under such circumstances to repudiate his honest bargain and to defeat his conscientious agreement by pleading the *Statute of Frauds*, and in the absence of such authority I do not feel bound to so decide.

A'BECKETT, J. (*dissentiente*). The question in this case is whether a mortgagee was justified in refusing to accept the money due on a mortgage when tendered to him by the mortgagor. The mortgage was of chattels, and contained the ordinary power of sale. The chattels were above the value of 10*l.*, and when the mortgage money was tendered no contract for sale valid within the *Statute of Frauds* subsisted, but there had been a *bonâ fide* sale by word of mouth, under which nothing had been paid, and possession had not been taken. The mortgagee, by reason of the verbal sale, refused to accept the amount due to him. No authority has been cited dealing with this state of facts, and we have to decide whether the refusal was right on general principles applicable to sales by mortgagees. The mortgagee owes a duty to the mortgagor to sell in a reasonable and proper manner, and inasmuch as the only object of the sale is to satisfy the debt, if the mortgagor makes a sufficient tender of the money due before sale, the mortgagee has no right to sell after such tender. The state of things existing at the time at which the tender was made determines the rights of the parties.

(*n*) 29 Ch. D., p. 224. (*o*) L.R. 4 Q.B., p. 108.

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At that time the mortgagee was under no legal obligation to part with the mortgaged property, and no one was under any legal obligation to pay for it. The mortgagee had therefore power to restore it to the mortgagor without incurring liability to any one. Having the power to restore, was he bound to restore when tendered what was due? I think he was. The only obstruction set up to the mortgagor's undoubted right to stop sale by tender was a sale which the Statute provided should "not be allowed to be good"—a sale which did not bind the purchaser to complete, and therefore not such a sale as a fiduciary vendor could justify as proper with regard to the person to whom he owed a duty. The mortgagee says in effect: "I have entered into a transaction by which I hold myself, as against you, bound to the purchaser, but by which, as in your favour, the purchaser is not bound to me. You have no right to assume that the purchaser will not do what he has promised to do, and if he does it I shall complete the sale to him." The mortgagor may properly answer that a sale so effected is not a binding sale as against him, inasmuch as it is wanting in the legal essentials to a valid contract, and is used to hold him bound while the purchaser is loose. Whatever its effect might be as to the legal property in the chattels, if subsequently made binding by one of those essentials being supplied as it stood when the tender was made, it constituted no legal impediment to the mortgagee giving back the property. We have not to consider an abstract question of law as to the exact difference between the 4th and the 17th sections of the *Statute of Frauds*, or as to the precise point of time at which the property in chattels passes on a sale made by word of mouth, and afterwards ratified by payment or delivery, but a question of conduct involving no legal subtleties. Was the mortgagee acting inequitably with regard to the mortgagor when he refused to restore the mortgaged property on payment of what was due on it? Admittedly he stood in a position in which he could have restored had he chosen to do so, but he contends that he was not bound to do so, and that he had the option of refusing to take the money due, and of afterwards completing the inchoate transaction. I think he had no such option. He was not absolute owner of the chattels, but under a duty to give them back when paid what was due on them. The purchaser chose to deal as to them in a manner which

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created no binding legal tie, and therefore he could not complain if before he or the vendor became bound the third person intervened who, on paying the debt, was entitled to the chattels. If the mortgagee had yielded to this right, he would have broken no promise to the purchaser binding in a court of law or in a court of conscience. I therefore think that he ought to have yielded to this right by receiving the money due to him, and that the question reserved should be answered by declaring that the tender is an answer to the plaintiff's claim.

Solicitors for plaintiff: *Smart & Walker.*
Solicitor for defendants: *Watson.*

A. F. M.

THE QUEEN *v.* THE BUCKLEY SWAMP ESTATE COMPANY LIMITED.

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Oct. 3, 4, 18.

Land tax—Classification—Liability to pay land tax prior to classification—"The Land Tax Act 1877"—*Land Tax Act* 1890 (*No.* 1107).

Prior to the 28th August 1888 the defendant company became the proprietor of an estate in land of sufficient area and value to constitute a "landed estate" within the meaning of the *Land Tax Acts* 1877 and 1890. This estate was not classified under the provisions of the *Land Tax Acts* until the 14th November 1890. The Crown claimed that the defendant was liable to pay the land tax on the estate for the period prior to the classification during which the land was of the required area and value to constitute a "landed estate."

Held, that the land did not become a "landed estate" prior to classification, and that therefore there was no retrospective liability on the defendant to pay land tax on the land prior to the time at which it had been valued and classified under the provisions of the *Land Tax Acts.*

Distinguished R. v. Palmer (1903) V.L.R. 3

THIS was a question reserved by Williams, J., for the opinion of the Full Court. The facts appear in the head note and the judgment.

Box for the plaintiff—The point to be decided is whether the Crown can recover land tax on land for a period anterior to the classification of the land. It is contended that land becomes liable to pay tax as soon as its area and value render it capable of being a landed estate within the meaning of sec. 2 of "*The Land Tax Act* 1877." The amount of the tax may not be fixed till the

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land has been classified, but the liability to pay the tax relates back to the time when the land became capable of being a landed estate. The object of the Act of 1877 was to impose the tax at once; the liability is clearly imposed by sec. 3 of the Act (sec. 4 of the *Land Tax Act* 1890). By sec. 5 of the earlier Act it appears that the tax, of whatever amount it might be, would be payable on the 1st of December 1877; the amount is to be fixed when the classification has been effected. Sec. 6 of the Act of 1877 (sec. 7 of the present Act) was passed to provide a time for payment of the tax in case of delay in classification; that is, to meet a case like the present.

Madden and *Williams* for the defendants—This being a taxing Act will be construed strictly: *Maxwell on Statutes* (2nd ed.), p. 143; *Partington* v. *The Attorney-General* (*a*). What the Act taxes is not land of a certain area and value, but a "landed estate," and such land does not become a "landed estate" until it has been classified. No words are used to make the tax retrospective. If the plaintiff's view is correct, then it might be for the advantage of the Crown to delay classification for a long period, during the whole of which the owner might be constantly improving his land, and he might be liable to be classified in a higher class than he would have been at the time when he first became possessed of his estate.

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HODGES, JJ.]. The question has been reserved for the Full Court by Williams, J., who heard this case, whether upon the proofs submitted and admitted the plaintiff is entitled to recover any land tax in respect of the land mentioned in the pleadings herein in respect of any half-year anterior to the 28th of August 1890.

The information claimed 168*l.* 1*s.* 9*d.* for land tax and for arrears of land tax due and payable from the defendant to Her Majesty the Queen for seven half-years, commencing on 28th of

(*a*) L.R. 4 E. & I. App., at p. 122.

August 1888. The defendant in its defence alleged a tender of 72*l.* 0*s.* 9*d.* for three half-years, and it paid this sum into Court. With respect to the four preceding half-years, the defendant averred that the estate in respect of which the land tax was alleged to be payable did not become a landed estate within the meaning of "*The Land Tax Act* 1877" and of the *Land Tax Act* 1890 until the 14th November 1890, and that such estate did not under these circumstances become liable to pay any land tax to Her Majesty until the 1st December 1890. The plaintiff, in the reply, alleged that prior to the 28th August 1888 the defendant became and was the registered proprietor, under the *Transfer of Land Statute*, of an estate in fee simple in possession of sufficient area and value to constitute a landed estate within the meaning of the *Land Tax Acts*, and thence continually remained, and was at the time of the commencement of the suit such registered proprietor, and the said estate was duly classified, under the said Acts, as of the second class, on the 14th November 1890, and that by reason of the premises the defendant was liable to pay the land tax as from the 28th August 1888. The question thus raised for our determination is whether the owner, within the meaning of the *Land Tax Acts*, of land of sufficient area and value to constitute a landed estate becomes liable, after classification of the land, to pay the land tax in respect of the land of which he is the owner at the time of classification, for the period prior to classification, during which the land has been of the required area and value.

It was decided by this Court in *The Queen* v. *McLellan* (*b*) that classification is a condition precedent to the liability of lands for taxation as constituting a landed estate. Admitting this, the plaintiff contends that as soon as classification takes place a retrospective liability arises to pay arrears of the tax in respect of the same land. This question is to be answered upon a consideration of the express distinct terms of the Statute by which the tax is imposed. If the Statute does not clearly annex to classified lands such a retrospective liability, the tax cannot be charged retrospectively. If, on the other hand, the Statute does expressly create such liability, the lands must be held to be liable, notwithstanding any hardship, however severe, that may thus be cast upon

(*b*) 17 V.L.R. 19.

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the owner. This rule of strict construction of taxing Acts was stated by Lord Cairns in *Partington* v. *The Attorney-General* (c) as follows:—

"As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case might otherwise appear to be; in other words, if there be in any Statute what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute where you can simply adhere to the words of the Statute."

The argument of the Crown rested chiefly on the 3rd section of "*The Land Tax Act* 1877," which now appears as the 4th section of the *Land Tax Act* 1890. It is in these terms:—

"Every owner of a landed estate, or of two or more landed estates, in Victoria, shall pay to Her Majesty every year in respect thereof a duty by way of land tax after the rate of one pound and five shillings for every hundred pounds of the capital value thereof, according to the valuation thereof, for the purposes of this Act, over and above the sum of 2,500*l*."

It was contended by Mr. Box that the Legislature clearly intimated its intention by these words that in all cases where at the time the original Act was passed land was owned in Victoria by any person of sufficient area and value to constitute a landed estate, such land should be liable to the land tax from the date of the passing of that Act, on 11th October 1877, and that such tax, including all arrears as from that date, would become payable as soon as the land should be classified. Such an intention is certainly not expressed by the words of this section, and we are of opinion that it cannot be drawn from them by reasonable inference. It is a "landed estate," and not land of sufficient area and value to constitute a landed estate, that is, the subject of the proposed tax. Land, although it be of sufficient area and value to constitute a landed estate, does not become a landed estate within the definition of that term in sec. 2 until it has been "valued for the purposes of this Act"; and such value, which is fixed by the Act itself at different amounts proportioned to the different classes in which it may be returned (sec. 14), is not and cannot be ascertained until the classifiers have estimated the grazing capabilities of the land, and have made a return of the land as belonging to one of four classes,

(c) L.R. 4 E. & I. App., at 122.

according to the scale fixed by the Act. The retrospective operation claimed by the plaintiff, as contemplated by the third section, is not therefore created by that section, and we do not find a clear, or any, indication of such intention in any other part of the Act. An intimation of a different intention, inconsistent with the present claim of the Crown, is afforded by secs. 5 and 6. Here it is provided that the land tax year shall commence on the 28th August, that the tax shall be payable by equal half-yearly payments on the 1st day of December and the first day of June in every such year, and that in case the classification of any land, on any day on which land tax is payable, is not published in the *Government Gazette* on or before such day "the first payment of land tax in respect of any such land . . . . shall be payable so soon as such classification is so published." These provisions have undoubtedly a certain retrospective effect, but they appear by implication to limit the owner's liability to the tax to the beginning of the half-year during the course of which the land has been classified, and so to exclude liability for any previous half-year.

We are of opinion that the Crown has failed to bring the defendant within either the letter or the spirit of this law, and accordingly we think that the question reserved must be answered in the negative. We hold that, upon the proofs submitted and admitted, the plaintiff is not entitled to recover any land tax in respect of the land mentioned in the pleadings in respect of any half-year anterior to the 28th August 1890.

Solicitor for the plaintiff: *Guinness*, Crown solicitor.
Solicitor for the defendant: *J. Hall.*

A. F. M.

1892
October 12.

A'Beckett, J.

HOLLAND v. HAMMOND.

Health Act 1890 (*No.* 1098), *ss.* 251, 255—*Removal of nightsoil—Sanction of Governor in Council, proof of.*

The *Government Gazette* is sufficient evidence of the existence of the sanction of the Governor in Council, given in pursuance of the provisions of sec. 251 of Act No. 1098.

Where a place has been provided by a council with the sanction of the Governor in Council for the reception and deposit of nightsoil, such place cannot be used as a receptacle for nightsoil coming from all places wheresoever produced, but its use must be limited to nightsoil coming from the place mentioned in the sanction.

ORDER to review.

On the 21st September 1892, on the information of Alfred John Holland, an officer of the shire of Moorabbin, John E. Hammond, was convicted at petty sessions for depositing nightsoil in the shire of Moorabbin at a place known as Carr's depôt, which had not been deodorised and disinfected, and without the consent of the council of the shire, and was fined 2*l.*, with 10*l.* 10*s.* costs. It appeared that the defendant was a servant in the employ of one Carr, who was under contract with the city of Prahran to cart away from Prahran all noxious matter. It also appeared by the *Government Gazette* that the city of Prahran had the sanction of the Governor in Council, under sec. 251 of the *Health Act* 1890, to deposit the filth of that city at Carr's depôt in the shire of Moorabbin, and the evidence showed that the defendant, under orders from his employer, was merely taking nightsoil from one part of the depôt and depositing it in another. It also appeared that Carr was the contractor for the Brighton Council as well as for the city of Prahran. The justices, being of opinion that there was not sufficient proof that the nightsoil had been produced in the city of Prahran, convicted the defendant under sec. 255 of the *Health Act* 1890, which provides that any person who deposits nightsoil without deodorising or disinfecting it, and without the written consent of the council within whose municipality it is deposited, shall be guilty of an offence. The defendant then obtained an order *nisi* to review their decision on the grounds that on the whole of the evidence it was not proved that any offence had been committed; that the evidence showed that the defendant had a right to do the act complained of;

that the evidence showed that the defendant acted under a reasonable belief that he had the right to do the act complained of; and that certain evidence tendered by the defendant had been improperly rejected.

Bryant to show cause.

Irvine to move the order absolute.

A'BECKETT, J. It seems to me clear that sec. 251 of the *Health Act* 1890 is free from the restrictions contained in sec. 255 of the Act. I think that from the object as well as the language of sec. 251, it is manifest that the conditions contained in sec. 255 do not attach. Another objection raised is that there is no proper evidence of the sanction given by the Governor in Council. I hold that the *Government Gazette* is sufficient evidence of the existence of the sanction, though I agree with the argument that this sanction is not one of those three things, viz., a proclamation, order, or regulation mentioned in sec. 17 of the *Evidence Act* 1890. As to the objection that the sanction given is too general in its terms, and is therefore invalid, I hold that its terms ought, as a matter of construction, to be read as restricted by the preliminary reference to the authority under which the sanction is given—the recital of the power. The sanction is given in terms not inconsistent with the restriction, and the restriction must be read into the sanction. Any attempt to go beyond that restriction would be contrary to the sanction given. I think that one of these places is not to be a receptacle for filth from all places wheresoever produced, but its use must be limited to filth coming from the place mentioned in the sanction. These are the important matters of law involved in this case.

Then I come to the question whether on the evidence this man was rightly convicted or not. As to that, I understand him to have been tried as for an offence under sec. 255 of the *Health Act*. I think that a person who is proved to have been merely removing from one place to another in the authorised area, filth which has been deposited, and which is already in a place set apart under the terms of sec. 251 of the Act, and acting under the authority of

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persons who have the lawful occupation of that place, as this man appears to have been doing, and these being the only facts proved against him, is not called upon to prove that the filth which he is so removing has been lawfully brought into that place. I do not think that such a person has committed an offence under sec. 255. I quite agree with the argument that if a person were seen bringing into a place provided by sec. 251 for the deposit of filth something which was not there already, it would be incumbent on him to show that he was taking there that which he might lawfully take there. But I do not think that a person who is merely a servant removing something which is there already can be convicted under sec. 255, because it is not proved where that filth came from. I think the grounds upon which this rule was obtained cover the views which I have expressed as to this case. I think, on the whole of the evidence, that it was not proved that any offence had been committed, and on the first ground alone of the order *nisi* I make the order absolute, with costs. I also order the costs of the proceedings in the court below, 10*l.* 10*s.*, to be paid by the complainants.

Solicitors for complainant: *Crisp, Lewis & Hedderwick.*
Solicitors for defendant: *Gillott, Croker & Snowden.*

W. H. M.

1892
November 15.

Hodges, J.

[IN CHAMBERS.]

IN RE THE BUCKLEY'S SWAMP ESTATE COMPANY, IN LIQUIDATION.

Company—Voluntary winding up—Judgment recovered against company—Resolution for voluntary winding up before sale by sheriff of company's assets under writ of fi. fa.—Companies Act 1890, *s.* 124.

Judgment had been recovered against a company, and a writ of *fi. fa.* issued thereon against the company's land. Before sale by the sheriff under this writ, the company went into voluntary liquidation.

Held, that the Court had power to stay any further proceedings in the execution of the writ.

SUMMONS on the part of the liquidator of The Buckley's Swamp Estate Company (in liquidation) to restrain the Yatchaw

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Irrigation and Water Supply Trust from taking any proceedings under a judgment and execution obtained by the trust against the company on several grounds. The only ground argued was that set forth in the affidavit of the liquidator of the company, which disclosed the following facts:—

The respondent trust had recovered judgment in a court of petty sessions against the applicant company on the 29th of July 1892 for the sum of 114*l*. On the 7th of September 1892 the trust removed this judgment into the Supreme Court, and a writ of *fi. fa.* issued thereon, but execution had not been levied thereon. On the 7th of November 1892 the applicant company went into voluntary liquidation. It was sworn by the liquidator that certain land of the applicant company, in respect of which the execution would be put in force, was practically its only asset, and that if the sheriff proceeded with the sale of this land it would be sold at a low sum, and that the interests of all the other creditors would be injuriously affected; but that if the sale were stayed, the land would be sold so advantageously that all the creditors of the company would be paid their claims in full.

Hayes, for the liquidator of the applicant company, in support—The authorities go to show that the Court will stay execution in such a case as this as long as the priority of a creditor is not defeated. He cited: *Emden on Winding up Companies* (4th ed.), p. 98; *In re Plas-yn-Mhowys Coal Co.* (*a*); *Exp. Railway Steel and Plant Co.* (*b*); *Gray* v. *Australian Deposit and Mortgage Bank* (*c*).

Davis to oppose—The cases cited are cases of compulsory, not voluntary liquidation. He referred to *Westbury* v. *Twigg* (*d*).

Hayes in reply—Sec. 124 of the *Companies Act* 1890 gives the Court same powers when a company is being voluntarily as it were being compulsorily wound up.

HODGES, J. (after stating the facts and the nature of the application). The only doubt I had was whether I had jurisdiction to

(*a*) L.R. 4 Eq. 689.
(*b*) 8 Ch. D. 183.
(*c*) 13 A.L.T. 230.
(*d*) [1892] 1 Q.B. 77.

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Hodges, J.

restrain this sale. It has been decided in some cases cited by Mr. Hayes that the Court has a jurisdiction to restrain the sale in a case like this where the liquidation is compulsory. Such a power, I presume, is vested in the courts in England by sections in the English Act equivalent to the secs. 80 and 82 of our *Companies Act* 1890. The question which remains to be decided is, whether the Court can exercise this power of restraining the sale in cases of voluntary liquidation. By sec. 124 of the *Companies Act* 1890 it is provided:—

"Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court."

Now one of the powers which the Court might exercise, if the company were being wound up by the Court, would be this power of restraining a sale on such terms as the Court thinks fit, and I think that that section therefore gives the Court power to stay a sale where a company is being voluntarily wound up. In the case of *Westbury* v. *Twigg & Co* (*e*), Day, J., says, at p. 80:—

"I am of opinion that, until the execution is completed by seizure and sale, the Court has power to restrain such proceedings, and will not hesitate to exercise that power. What the Legislature aimed at was, that assets of insolvent companies should be distributed equally among their creditors, and it aimed at such equality of distribution just as much where the company was being wound up voluntarily as where it was being wound up under an order of the Court."

That case is an authority for me to exercise my jurisdiction in the present one, and accordingly I think I have power to make the order applied for, and I feel satisfied that to compel a sale now would be vain, as it would sacrifice the only valuable asset of the company. I think that I ought to grant an injunction against the sale of this asset, but that the judgment creditor should not be deprived of his right of priority, and should have when the property is realised a just charge on what it brings for his judgment debt, and for sheriff's costs, and for his costs in this application. For these amounts I think he should be fully secured, therefore I direct this sale to be stayed, and that the judgment creditor is to have the opportunity of applying to the Court if the disposal of the property

(*e*) [1892] 1 Q.B. 77.

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In re THE BUCKLEY'S SWAMP ESTATE COMPANY.

Hodges, J.

is unreasonably delayed. In the order I make I therefore reserve the right of the judgment creditor to apply to the Court if the sale be unreasonably delayed; interest to be allowed to the judgment creditor at the rate of six per cent. from the present time until the sale, and having regard to this allowance of interest, I should be disposed to allow the liquidator a somewhat further time in which to realise than I should otherwise be disposed to grant him.

Solicitor for the applicant: *Hall.*

Solicitor for the respondent: *Hill* for *A. C. Palmer.*

A. F. M.

[IN CHAMBERS.]

SPEED *v.* LYONS.

1892
Nov. 16, 18.

Hodges, J.

Practice—Specially indorsed writ—"Rules of the Supreme Court 1884*"—Order III., r.* 6*—Order XIV., r.* 1*—Claim for interest.*

A writ purporting to be specially indorsed contained a claim on a promissory note, with a claim for interest in the following form, "and also for interest agreed to be paid thereon."

Held, that the claim for interest could not be construed as a claim for interest under the *Instruments Act* 1890, and the writ was not specially indorsed.

APPLICATION on behalf of the plaintiff, under Order XIV., r. 1, for leave to sign final judgment.

The writ was indorsed as follows:—

STATEMENT OF CLAIM.

The plaintiff's claim is against the defendant as the maker of a promissory note for 500*l.*, dated 1st November 1891, payable four months after date, of which said promissory note the plaintiff is payee and holder, and which said note on presentation for payment was dishonoured, of which dishonour you (the defendant) have had due notice, and also for interest agreed to be paid thereon.

PARTICULARS.

Principal	500*l.*
Interest	20*l.*
Amount due	520*l.*

Anderson to oppose—There is a preliminary objection to this application. The writ is not specially indorsed. There is a bare allegation that the interest is claimed under and by virtue of an

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agreement, but it is not stated whether the agreement was verbal or in writing, and that is necessary: *Cuttance* v. *Thompson* (*a*). The rate is not specified, nor are dates given. If the interest is claimed by virtue of the Statute (the *Instruments Act* 1890), then that should have been specifically alleged: *London and Universal Bank* v. *Clancarty* (*b*); *Ryley* v. *Master* (*c*); *Danby* v. *Askew* (*d*). The writ shows that the interest is claimed under some agreement, and therefore the plaintiff cannot now rely upon the provisions of the *Instruments Act* 1890.

Counsel also referred to the case of *Gold Ores Reduction Co.* v. *Parr* (*e*).

Cussen in support of the application—The use of the words in the writ "agreed to be paid" do not prevent the operation of the Statute. The agreement is created by the Statute itself; the rate and the time during which interest can be claimed are fixed by the *Instruments Act*, and the defendant must be presumed to know the law. If the interest was not claimed under the Statute, but by virtue of some agreement, then it is admitted that the writ would not be specially indorsed. The *Instruments Act*, however, governs all claims of this nature, and there is no necessity to set out in the writ all the particulars that the parties must be presumed to know.

Counsel referred to *Bank of Victoria* v. *Perrin* (*f*); *Ryley* v. *Master* (*c*).

Anderson in reply—All the cases cited show that claims made under the *Instruments Act* contain a specific allegation to that effect. Parties cannot be supposed to spell out of a claim for interest, said to be by agreement, the particular provisions of a Statute which is not referred to.

Cur. adv. vult.

HODGES, J.: This was an application under Order XIV., r. 1, for leave to sign final judgment. An objection was taken that the writ of summons was not specially indorsed, inasmuch as the claim

(*a*) 10 A.L.T. 40.
(*b*) [1892] 1 Q.B. 689.
(*c*) [1892] 1 Q.B. 674.
(*d*) 18 V.L.R., p. 319.
(*e*) [1892] 2 Q.B. 14.
(*f*) 13 A.L.T. 231.

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for interest was not such as ought to be stated or claimed in a specially indorsed writ. The claim was in the following terms:— [His Honor here read the indorsement]. It was admitted by Mr. Cussen, and I think rightly admitted, that if the claim for interest referred to a claim for interest under an agreement actually entered into between the parties, the indorsement was not in such a form as to constitute it a special indorsement; but he urged that the claim for interest might be construed as a claim for interest under the *Instruments Act* 1890, and that as such the plaintiff would be entitled to indorse his writ for interest. In considering whether a writ is specially indorsed or not, I think it is the duty of a judge to consider what the person to whom it is delivered would naturally understand by it, and I entertain no doubt that the defendant in this case, on looking at the indorsement, would consider the claim for interest was based on an agreement *inter partes* to pay interest if the principal sum were not paid at the due date. If at the trial the plaintiff were to tender evidence of a specific agreement to pay interest, I do not think that on the indorsement as it stands the defendant could successfully object to evidence of such specific agreement being given. I think the natural meaning of the words, "for interest agreed to be paid thereon," is that there was a specific agreement to pay interest if the principal sum were not paid when due. Mr. Cussen then suggests that I might reject these words altogether, and treat them as if they were not inserted in the indorsement. I cannot see upon what grounds I can reject them. I might in the same way be asked to reject the whole or any other part of the indorsement. The writ to which the defendant appears has to be specially indorsed, and if at the time of appearance the writ is not specially indorsed the plaintiff cannot succeed in an application for final judgment under Order XIV., r. 1. As this writ was not specially indorsed at the time the defendant entered an appearance, I must dismiss the application.

Solicitor for plaintiff: *Wisewould*, for *Kirby*.
Solicitors for defendant: *Duffy & King*.

W. H. M.

1892
Nov. 25, 28.

Williams, J.

[IN CHAMBERS.]

IN RE BALACLAVA ESTATE CO. LIMITED.

Practice—Winding-up—Official liquidator—Application to tax costs—Notice.

Where an official liquidator applies for an order to have his costs taxed, it should be shown by affidavit whether the parties interested in the winding-up have, or have not, left their names and addresses with the liquidator, so that notice of the taxation may be served on them, if the judge shall so direct.

THIS was an application made on behalf af the liquidator of the Balaclava Estate Co. Limited for an order to the taxing officer to tax the costs of the official liquidator. The application was made *exparte*. No affidavit was filed. His Honor said he would consider the application.

Cur. adv. vult.

WILLIAMS, J. An application was made for an order as a matter of course, directing the taxing officer to tax the costs of the official liquidator. I felt it right not to grant an order of this character as a matter of course without some consideration, for it would allow the liquidator to have his own way entirely before the taxing officer. If parties interested in the winding-up of the estate have not left their names and addresses in the book kept for that purpose, at which notice of proceedings could be served upon them, I would make this order as a matter of course; but if the names and addresses have been so left, I think notice of these applications should be given to such parties. In future those who apply for orders of this kind should have an affidavit, either stating that no parties have left their names and addresses, with the object of having notice of proceedings served upon them, or if the fact be otherwise, then that should be so stated, and the judge may thereupon make the order directing notice of taxation to be served upon them, if he thinks fit. In this case I shall direct my associate to go to the liquidator's office and ascertain the facts, and if the parties have left their addresses I shall direct that notice of taxation be served upon them.

Solicitors for liquidator: *Attenborough, Nunn & Smith.*

W. H. M.

[IN CHAMBERS.]

1892
December 8.

Williams, J.

BYRNE v. THE VICTORIAN RAILWAYS COMMISSIONERS.

Practice—Lands Compensation Act 1890 (*No.* 1109)—*ss.* 9, 30, 31—*Compensation to be fixed by jury—Issue—Amount of claim.*

Where either party proceeds under sec. 31 of Act No. 1109 to have the question of compensation tried by a jury by means of an issue, the claimant is not bound by the amount of his original notice of claim, and may claim in the issue any sum he thinks he is entitled to.

THIS was an application to settle an issue under sec. 31 of the *Lands Compensation Act* 1890. When notice was given by the Railways Commissioners to the claimant that his lands were required, the claimant sent in a notice of claim claiming a certain amount, pursuant to the provisions of sec. 9 of the Act. The parties proceeded to arbitration upon this claim, and an award was made. The Commissioners being dissatisfied with the award, then sought to have the question of compensation settled by a jury. The claimant upon the issue being settled sought to increase the amount of his claim beyond the amount claimed in the original notice. The Commissioners objected to this being done, contending that the claimant was bound by his original claim. The claimant then took out this summons to have the issue settled by the judge, and claiming to be entitled to increase the amount in the issue.

Cooke for the claimant.

C. A. Smyth for the Commissioners.

WILLIAMS, J. I think that the parties are at large when recourse is had to the scheme provided by sec. 31, and the claimant is not bound by the amount of his original claim. The board can show if it likes that the claimant is not entitled to anything. The only thing to be looked at by the judge (not by the jury) is the award. The claim disappears altogether. Notice of the amount claimed is required by sec. 9, so as to enable the board to treat and come to an agreement without any proceedings at all. If no agreement is come to, then sec. 13 makes provision for subsequent proceedings, and the notice under sec. 9 is essential for the purpose

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BYRNE v. THE VICTORIAN RAILWAYS COMMISSIONERS.

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of deciding the mode of procedure (according as the claim exceeds a certain amount or not), and after an award is made, for the further purpose of ascertaining the question of costs. Then follow certain provisions in the Act for appointing arbitrators. By sec. 30 provision is made as to costs, and for the purpose of that section the notice of claim is, as I have stated, most essential. But when the provisions of sec. 31 are looked at, it will be observed that the amount of the claim is no longer an essential element in the proceedings, it is the amount of the "award" that governs the question of costs. Sec. 31 provides that "the party claiming compensation shall proceed in the Supreme Court before a special jury by means of an issue in the form and to the effect in the second schedule . . . ." Now the claim originally made is in no way necessary to settling the issue. The party must establish his right to compensation, and the jury fix the amount, irrespective of all prior negotiations. After the verdict is given the "award" is looked at, so as to ascertain which party has to pay costs, in the same manner as the original claim is looked at for the purpose of fixing the costs of an arbitration under sec. 30.

Although this is a matter of first impressions, I have no doubt about it at all. If a party is dissatisfied with the award, and proceeds to an issue under sec. 31, both parties are at large, and the previous proceedings are not regarded. The plaintiff is at liberty to claim any amount he likes. I shall direct the issue to be settled by inserting the amount now claimed by the claimant; at the same time I shall direct full particulars of such extended claim to be given.

Solicitor for claimant: *W. S. Fergie.*

Solicitor for Victorian Railways Commissioners: *Guinness*, Crown Solicitor.

W. H. M.

[IN CHAMBERS.]

1892
December 16.

Williams, J.

SANDS, McDOUGALL & Co. *v.* NIND AND ANOTHER.

Practice—Special indorsement—"Rules of the Supreme Court 1884*"—Order III., r.* 6*—Order XIV., r.* 1*—Claim for interest.*

An indorsement of a claim for interest on a writ of summons, where it purports to be a special indorsement, should show that the interest claimed is payable under an agreement or by virtue of some Statute.

THIS was an application made on behalf of the plaintiff under Order XIV., r. 1, for leave to sign final judgment. The writ was in the following form :—

"The plaintiffs' claim is against the defendants as executrix and executor of the will of the late P. P. Nind, for the sum of 107*l.* 10*s.* 10*d.*, the amount of two several promissory notes for 48*l.* 9*s.* 1*d.*, made 2nd March 1891, and payable three months after date, and for 46*l.* 7*s.* 6*d.*, made 2nd February 1891, and payable three months after date respectively, and interest thereon, both made by the said P. P. Nind, and for the price of goods sold and delivered, and for moneys paid by the plaintiff for carriage of goods, and at the request and to the use of the said P. P. Nind.

PARTICULARS.

1891—5th May.	Promissory note due this day	...	46*l.*	7*s.* 6*d.*
	Interest thereon to date	...	5*l.*	11*s.* 2*d.*
5th June.	Promissory note due this day	...	48*l.*	9*s.* 1*d.*
	Interest thereon to date	..	5*l.*	9*s.* 4*d.*
Then followed particulars as to the carriage of goods		...	1*l.*	13*s.* 9*d.*
			107*l.*	10*s.* 10*d.*"

Moule, for the defendants, to oppose the application—There is a preliminary objection to this writ. The plaintiff has claimed interest, but has not alleged whether such interest is claimed by virtue of the *Instruments Act* 1890, or under some agreement between the parties. It is necessary that a plaintiff should specify his right to claim interest: *Gold Ores Reduction Co.* v. *Parr* (*a*). That case expressly governs this point, and decides that the plaintiff must show either that the interest claimed is payable under an agreement, or that it is fixed by Statute. There is a further objection that the rate of interest charged has not been specified: *Federal Bank of Australia* v. *Byrne* (*b*).

(*a*) [1892] 2 Q.B. 14. (*b*) 18 V.L.R. 300.

1892

SANDS, McDOUGALL & Co. v. NIND.

Williams, J.

Vasey in support of the application—The writ is indorsed in precisely the same form as the writ in the case of *Lawrence* v. *Wilcocks* (*c*), and in that case the Court of Appeal decided that the special indorsement was good. The decision of the Court of Appeal cannot be overruled by the decision in the case of *Gold Ores Reduction Co.* v. *Parr*, which was not a decision of the Court of Appeal.

[WILLIAMS, J. This point was not raised in *Lawrence* v. *Wilcocks*.]

The Court may look at the affidavits filed, and ascertain the mode in which interest is claimed. This was allowed in the case of *The Bank of Victoria* v. *Perrin* (*d*).

WILLIAMS, J. I do not think that this is a specially indorsed writ. It ought to state whether the interest claimed is the subject matter of a special agreement, or whether it is claimed under the Statute, and it certainly ought to specify the rate of interest charged. The case of *Gold Ores Reduction Co.* v. *Parr*, cited by Mr. Moule, is exactly in point. The two judges deciding that case seem to have had no doubt that the writ should show whether the claim for interest was claimed by virtue of an agreement, or under the Statute. I think my decision in *New Oriental Bank* v. *Pett* (*e*) is right; but in the case of *The Bank of Victoria* v. *Perrin*, though the head-note correctly expresses the law, yet when I examine the indorsement on the writ again, I think the indorsement is bad. The writ should have stated in that case that the interest claimed was "interest at the usual rate, as provided by agreement between the parties; such usual rate of interest is 8 per cent." If that had been inserted it would have rendered the writ good. The application in this case will be refused.

Solicitors for plaintiff: *Bruce & McCutcheon.*
Solicitor for defendants: *D. Wilkie.*

W. H. M.

(*c*) [1892] 1 Q.B. 696. (*d*) *Ante*, p. 137. (*e*) *Ante*, p. 136.

DICKENS & CO. *v.* INGRAM.

1892
July 25.

Williams, J.

Company—Directors—Promissory note—Signatures of directors—Personal liability—Knowledge of payee of note—Equitable defence.

Where directors of a limited liability company gave two promissory notes on behalf of the company, but signed them with their own names, not as directors of the company, and the payees of the notes took them as binding on the company, and did not suppose that the directors were in any way personally responsible on them, the Court, on action by the payees against the directors personally after the liquidation of the company, thinking it would be inequitable to allow them to take advantage of the mistake made by the defendants in their mode of signature, refused them relief.

ACTION by Dickens & Co. against Thomas Ingram and Robert Green upon their joint and several promissory notes.

The defendants, as directors of a limited liability company, made the promissory notes on behalf of the company, but signed the same without stating that they did so as directors. The plaintiffs, according to the evidence, knew that they were making them on behalf of the company.

Bryant for the plaintiffs—Directors of a company making a promissory note on behalf of their company, but without words restricting their personal liability, are personally liable as makers of the note: *White* v. *Bank of Victoria* (*a*); *Harriman* v. *Purches* (*b*); *Alexander* v. *Sizer* (*c*); *Dutton* v. *Marsh* (*d*).

Isaacs and *Mackinnon* for the defendants—The plaintiffs knew that the defendants, when they made the note, did not intend to act as principals, or to make themselves personally liable, but only to bind the company as its directors. Under these circumstances it would be a fraud on the plaintiffs' part if they were to hold the defendants personally liable merely because they omitted to sign the note in the proper form, and the Court will not assist them to commit a fraud: *Wake* v. *Harrep* (*e*); *Courtauld* v. *Saunders* (*f*);

(*a*) 8 V.L.R. M. 8.
(*b*) 9 V.L.R. (L.) 234.
(*c*) L.R. 4 Ex. 102.
(*d*) L.R. 6 Q.B. 361.
(*e*) 6 H. & N. 768; and on appeal, 1 H. & C. 202.
(*f*) 16 L.T. (N.S.) 468.

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Aggs v. *Nicholson* (*g*); *Roscoe's Nisi Prius Evidence* (13th ed.), 396; *Clever* v. *Kirkman* (*h*); *Cowie* v. *Witt* (*i*); *Nicoll* v. *Bell* (*k*); *Druiff* v. *Lord Parker* (*l*). In this case sec. 48 of the *Companies Act* 1890 (No. 1074) makes the notes signed by the directors notes for which the company was liable: *Price* v. *Taylor* (*m*). *Harriman* v. *Purches*, cited *contra*, was an appeal from the County Court, and this question of equitable defence was not raised. In *White* v. *Bank of Victoria*, also cited *contra*, an attempt was made to hold a mining company responsible on a guarantee which the directors signed, and it was merely held that as they did not purport to sign as directors, but merely gave their description as such, the company was not bound, nor could it have been bound if it had purported to be given by them as directors.

Bryant in reply—In order that the defendants may rely on the doctrine established by the cases cited for them, they must show that there was an express or a necessarily implied agreement that the company only should be looked to—that the defendants should not be liable. There is nothing of that sort suggested here. The plaintiffs got the notes in the ordinary course of business through Fraser & Co., who were simply their agents to sell tea.

WILLIAMS, J. I do not think I should be any wiser if I reserved my judgment. If I had to decide this case as a dry question of law I should, undoubtedly, give judgment for the plaintiffs for the full amount of the notes and interest. But I am now, in this jurisdiction, at liberty to look at the equities of the case, and though I think that there is no doubt that, *primâ facie*, the defendants are personally liable upon these notes, owing to the way in which each of them has signed the notes, yet still the circumstances of the case raise an equity which would make it unfair on the part of the plaintiffs to hold them liable on the notes. I draw this inference from the facts that have been proved, viz., that when the plaintiffs took the notes they did not take them as attaching any personal liability to the defendants or either of them,

(*g*) 1 H. & N. 165.
(*h*) 33 L.T. (N.S.), p. 674.
(*i*) 23 W.R. 76.
(*k*) 32 L.T. (N.S.) 816.
(*l*) L.R. 5 Eq., p. 137.
(*m*) 5 H. & N. 540.

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and that when they took them they did not think for one moment that the defendants, or either of them, were in any way liable on either of these notes. On the other hand, I infer that when they took them they took them as binding on the company and on it only. I also think that subsequently, when the company went into liquidation, and these promissory notes became dishonoured, the plaintiffs took advice and then learnt that, owing to an omission in the mode of signing, they might be able to make the defendants personally liable on them. Drawing those inferences and finding those facts, I think the plaintiffs are now inequitably endeavouring to take advantage of a mistake made by the defendants in their mode of signature, which in no way affected the plaintiffs in taking or accepting the promissory notes now sued on. I think that is a good defence—a good equitable defence, and I find it proved. I therefore order judgment to be entered for the defendants with costs to be taxed. If the defence that I base my judgment on is not sufficiently raised by the pleadings, I give the defendants leave to amend so as to raise it, such amendment to be made within a fortnight if thought necessary.

Solicitors for plaintiffs: *Eggleston, Derham & Martin.*
Solicitors for defendants: *Blake & Riggall.*

A. J. A.

BYRCHALL *v.* THE QUEEN.

F.C.

1892
February 4.
April 12.
August 3.

Public Service—Officer in Public Service—Offence—Mode of dealing with—Officer appointed under Act No. 160—"*The Public Service Act* 1883" (*No.* 773)—"*The Public Service Act* 1889" (*No.* 1024), *ss.* 29 *and* 30—*Public Service Act* 1890 (*No.* 1133), *ss.* 123 *and* 124.

Since the passing of "*The Public Service Act* 1889" (No. 1024), the offences with which all officers in the Public Service, whether appointed prior to "*The Public Service Act* 1883" (No. 773) or not, may be charged, and the manner in which they may be dealt with, is governed by secs. 29 and 30 of that Act (No. 1024), repeated in the *Consolidation Act* of 1890 (No. 1133), secs. 123 and 124.

PETITION by Samuel Richmond Byrchall against Her Majesty the Queen.

The petitioner was formerly employed as paying teller in the savings bank branch of the Post Office, but on the 3rd of September

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1890, he was suspended by the permanent head of the department. On the 23rd October 1890 he was tried by a board, consisting of two members of the Public Service Board, on two charges, viz., (A) being careless in the discharge of his duties, in failing to account for the sum of 130*l.* on the 1st September 1890; and (B) being guilty of improper conduct in contracting debts, for which judgments of Court were subsequently obtained, and failing to satisfy such judgments. The Board found the charges proved, and accordingly recommended his dismissal, and on the 3rd of November he was dismissed. The petitioner alleged that the dismissal was illegal and wrongful, in that as he was an officer classified under Act No. 160, he was entitled to be tried by a special board, appointed in accordance with the provisions of that Act, and that the ordinary Public Service Board had no authority to hear the case. The contention on the part of the Crown was that all civil servants guilty of misconduct were subject to the provisions of the *Public Service Act* 1890, which authorised the Public Service Board to deal with such matters.

The petitioner claimed reinstatement in office, and 205*l.* 16*s.* 2*d.* back pay; or, in the alternative, 1,000*l.* damages.

The petitioner sued *in formâ pauperis*.

Hayball for the petitioner.

Madden and *Box* for the respondent.

Cur. adv. vult.

April 12.

HOLROYD, J. A petition under the *Crown Remedies and Liability Act* 1890. When "*The Public Service Act* 1883" was passed the suppliant Byrchall was a civil servant within the meaning of the third schedule of the Act 25 Vict. (No. 160). He was at that time a permanent officer performing clerical duties in the savings bank branch of the Post Office and Telegraph Department. Subsequently he became a senior paying teller in the savings bank branch of the General Post Office, Melbourne, and was so employed at a salary of 220*l.* per annum on the 3rd of September 1890. On that day he was suspended by the permanent head of the department. He was accused of carelessness in the

discharge of his duties in failing to account for a sum of 130*l.* on the 1st of September 1890, and also of improper conduct in contracting debts for which judgments were subsequently obtained against him. An inquiry into the truth of these charges was afterwards held by two members of the Public Service Board, acting as the Board, who found the charges proved; and thereupon the Board so constituted dismissed the suppliant from the service with the consent and concurrence of the Governor in Council. Since his suspension the suppliant has continued able and willing to perform his duties, but has been prevented from doing so by the savings bank authorities. No salary has been paid to him since the 31st of August 1890. His petition is dated the 7th of August 1891. In the foregoing statement of facts I have incorporated the admissions made on behalf of Her Majesty on notice to admit, and also by counsel in open court.

The suppliant submits that his dismissal was wrongful and illegal, and claims the amount of his salary (205*l.* 16*s.* 2*d.*) from the 1st of September 1890 to the date of the petition, and to be reinstated in his former office without prejudice to any of his rights and privileges; or, in the alternative, damages for the alleged wrongful dismissal. One of his objections to the legality of his dismissal was that he only received notice of it by a letter from Mr. Smibert, the Deputy Postmaster-General, and that he should have been served with a copy of an Order in Council bearing the seal of the colony; but this objection was abandoned by his counsel at the hearing. His real complaint was that he had been tried and dismissed under the 76th and 82nd sections of "*The Public Service Act* 1883," repealed and re-enacted by the *Public Service Act* 1890 (see secs. 121 and 129), and under sec. 4 of "*The Public Service Act* 1889," also repealed and re-enacted by the *Public Service Act* 1890 (see sec. 6), which provides that any two members of the Public Service Board shall have power to perform any of the duties of the Board, instead of under the 32nd and 35th sections of the Act passed to regulate the civil service in 1862 (25 Vict. No. 160). The inquiry into the truth of the charges brought against him should, as he contends, have been conducted by a board of three persons, specially appointed by the Governor in Council for that purpose. The suppliant relied upon

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the case of *Browne* v. *The Queen*, in which it was decided by the Full Court that a person who, at the time of the passing of "*The Public Service Act* 1883," was subject to the provisions of the Act No. 160 was not affected by the 76th and 82nd sections of "*The Public Service Act* 1883," all his legal rights and privileges under the Act No. 160 having been expressly preserved and saved by the latter Act, and that his contract of service was one of those rights. Dr. Madden for the Crown intimated, with the view I suppose of avoiding any possible misunderstanding in the event of an appeal, that he challenged the decision of the Court in *Browne* v. *The Queen*, which was not unanimous; but as to this it is sufficient for me to say that I adhere to the opinion which, as a member of the majority of the Court, I then entertained. The learned counsel however attempted to draw a distinction between the present case and Browne's. Browne was dismissed from his post in consequence of a calamity which had befallen him, and which was found to incapacitate him for the discharge of his duties. Byrchall was dismissed for alleged indiscretions or delinquencies. Apart from subsequent legislation I fail to perceive what difference the distinction can make. Browne invoked the aid of the Court as Byrchall has done, because, as he asserted, the charges brought against him had been investigated by the wrong tribunal, a tribunal which had no jurisdiction in the matter; and it was on this ground, and not upon any consideration of the nature of the offence or unfitness imputed to him, that the Court pronounced in his favour. Another point however was raised upon the construction of secs. 29 and 30 of the subsequent Act of 1889, which appear in the Consolidated Statutes as secs. 123 and 124 of the *Public Service Act* 1890. By sec. 29 the Board, *i.e.*, the Public Service Board, is authorised to make regulations concerning the duties to be performed by officers in the Public Service, whether appointed before or after the passing of the Act of 1883, and the discipline to be observed in the performance of such duties. By sec. 30 it is provided that if *any officer* be guilty of any breach of the regulations, or if he be guilty of any misconduct or be negligent or careless in the discharge of his duties . . . . or be guilty of any disgraceful or improper conduct, such officer is to be deemed guilty of an offence. The permanent head of the Department, if

he thinks the offence sufficiently serious to report, may report the officer offending to the Minister; the Minister may, if he thinks fit, lay the matter before the Board, and unless the charges are admitted in writing the Board is to inquire into their truth, and finding them proved may with the consent of the Governor in Council dismiss the officer. In this way it was said, and in no other, the suppliant Byrchall was treated. The only regulations put in evidence were regulations made under sec. 123 of the *Public Service Act* 1890. Amongst them I have been unable to discover any regulation touching the offences of which the suppliant was accused, nor was any such regulation pointed out to me; but inasmuch as the suppliant had been accused of carelessness in the discharge of his duties and of improper conduct, and in the 30th section of the Act of 1889 these offences are coupled with breaches of the regulations and directed to be dealt with in the same manner, it was argued very forcibly that he was as much amenable to the jurisdiction of the Board as if he had committed a breach of the regulations, and consequently that he had with the consent of the Governor in Council been properly dismissed. My attention was also called to the exception in the proviso which preserves previously-acquired rights in the second section of the *Consolidating Act* of 1890. The repeal of the Public Service Acts of 1883 and 1889 is not to affect anything done under the Act No. 160, "or any privileges or rights existing at the commencement of the '*Public Service Act* 1883' or thereafter accruing of or to any person then subject to the provisions of the said Act No. 160, *save in so far as such rights or privileges may have been altered* or taken away by any Act amending '*The Public Service Act* 1883.'" That is only the language of a draughtsman cautious while engaged in the task of consolidation not to prejudice questions which might arise but which had not been determined under the enactments consolidated. But it is to be particularly noticed that the Act of 1889, although it contains a saving clause (sec. 2), does not preserve rights previously acquired which have not become operative, and there is nothing in it which limits the generality of the words "any officer" in the 30th section. Uncontrolled those words are wide enough to signify any officer whenever and however appointed, and as they must have that meaning in relation to breaches of the regulations,

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why should they not have it in relation to any other offence enumerated in the section? I think the argument for the Crown must prevail, and I must dismiss the petition.

From this decision the petitioner appealed to the Full Court. [*Coram* HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]

J. E. Mackey for the petitioner appellant—The petitioner having been appointed under the Act No. 160, two of the conditions of his contract of service were—first, that he should be dismissed for no other cause than those set forth in that Act; and secondly, that he should be dismissed in no other manner than that provided by that Act. That was expressly provided by sec. 27 of the Act No. 160. Sec. 32 provides the causes for which a civil servant, appointed under that Act, may be dismissed; sec. 35 provides that if he denies the truth he is to be tried by a board, consisting of at least three persons, appointed for the purpose. The petitioner was in fact charged with an offence under the *Public Service Act* 1890, and tried by the Public Service Board, and that too at a time when only two members of the Board were present. Prior to the passing of "*The Public Service Act* 1883" (No. 773), the petitioner had a right, as I have pointed out, to be tried for causes under and in the manner provided by the Act No. 160. By the Act No. 773, sec. 2, all the rights and privileges of officers in the service prior to the passing of that Act were expressly reserved.

[HIGINBOTHAM, C.J. That section does not expressly reserve rights, but it excepts from repeal those portions of the Act No. 160 under which rights were conferred or accrued.]

Yes. After the passing of that Act the case of *Browne* v. *The Queen* (*a*) was decided, in which it was held that rights accruing to an officer were not affected by the provisions of the Act No. 773, so far as related to the causes and manner of his dismissal. It is but a corollary to that, that there are one set of officers under the Act No. 160, and one set under the Act No. 773.

[HIGINBOTHAM, C.J. That corollary was not approved of in the later case of *Owen* v. *Kendall* (*b*). Your corollary is too wide. It

(*a*) 12 V.L.R. 397. (*b*) *Supra*, p. 71.

was only decided in *Browne* v. *The Queen* that the causes and manner of dismissal of officers under each Act were different.]

I will put it then that as to causes and manner of dismissal there are two classes of men, one class under each Act. Some of the causes of dismissal are common to each Act, others are different, but whether the same or different, the officers are to be dismissed—as to those under Act No. 160 in one manner, as to those under Act No. 773 in another—one by a board specially appointed, and consisting of not less than three; the other by the Public Service Board, at which two only of the commissioners need be, and were in this case, present. In 1889 an Act to amend the Act No. 773 was passed called "*The Public Service Act* 1889" (No. 1024), by sec. 1 of which it was provided that it should be read with the Act of 1883 (No. 773). By sec. 29 the Public Service Board may make regulations concerning the duties to be performed by officers in the public service, whether appointed before or after the Act No. 773, and affix to breaches of the regulations penalties according to the nature of the offence, and it is submitted that so far it is clear that the difference between those officers appointed before and those appointed after the passing of the Act No. 773 is in this respect maintained. Sec. 30 of the Act, however, which was evidently intended to carry out the provisions of sec. 29, uses the term "officer" without any qualification, and provides that if any officer be guilty of any breach of the regulations, or of misconduct, or be negligent or careless in the discharge of his duties, etc., he shall be guilty of an offence, and if charged with the commission of any such offence, may be dealt with under that section. It is, however, submitted that that section does not apply in any way to the case of officers appointed prior to the Act No. 773.

Where the Legislature intended to refer to officers appointed before, as well as to those appointed after, the Act No. 773, it expressly said so as in that section, and it is submitted that where it did not say so it did not so intend. All these Acts were consolidated by the Act of 1890, under which the petitioner was charged and dismissed, and by sec. 2 of that Act all the rights and privileges existing at the commencement of the Act No. 773 were preserved. The words "no officer" in the Public Service shall be dismissed except for the causes and in the manner set forth in the

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Act, used in sec. 76 of the Act No. 773, were held in *Browne* v. *The Queen* to mean "no officer appointed under that Act," and not to include officers appointed prior to it. The words "any officer," in sec. 80 of the Act No. 1024, are no stronger, and it is submitted that officer there means the same thing.

Madden and *Box*, for the Crown, were not called upon.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., A'BECKETT and HOOD, JJ.]. Nothing has been urged in argument to lead us to entertain a doubt of the correctness of the judgment of the learned primary judge. Argument has not been addressed to the views and reasons stated in his judgment, and we think those reasons, and the decision arrived at, were correct. The appeal will be dismissed.

Solicitor for petitioner: *Lyle*.
Solicitor for the Crown: *Guinness*, Crown Solicitor.

A. J. A.

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August 18, 19.
Hodges, J.

IN RE JOHN GIBSON WHITTLES.

Insolvency Act 1890 (*No.* 1102), *ss.* 37, 67 (v.), *and* 122—"*Secured debt*"—*Security over estate of respondent—Transfer to assignee—Guarantee of third person.*

A "secured debt" in sec. 37 of the *Insolvency Act* 1890 (No. 1102) means a debt for which the petitioner has security over the debtor's estate, capable of being handed over to the assignee or trustee for the benefit of all creditors on the estate being made insolvent. A guarantee for a debt given to the petitioner by a third person is not a security for the debt within the meaning of the section.

ORDER NISI for the sequestration of the estate of John Gibson Whittles, deceased, on the petition of the London Chartered Bank of Australia.

The act of insolvency alleged was failure to satisfy a judgment for 214*l.* 14*s.* 7*d.*, and the petition alleged that the debt was wholly unsecured.

An objection was filed that the debt was a secured debt, inasmuch as the debt to the bank was guaranteed by one John Ellison to the bank to the extent of 200*l.*, and the petitioner had not stated, in accordance with the Act, its readiness to give up such

security on adjudication of sequestration nor its willingness to give an estimate of the value of the security.

The alleged guarantee was admitted.

Higgins moved the order absolute.

Woolf for the respondent showed cause—The debt is clearly secured by the guarantee of Ellison, and sec. 37 provides that if the petitioning creditor's debt is a secured debt he cannot petition unless he state his readiness to give up his security or his willingness to give an estimate of its value. Promissory notes of other persons are security for a petitioning creditor's debt: *Re Cohen* (*a*).

[*Higgins*—Sec. 67 (v.) defines a "secured creditor;" his security must be on the insolvent's estate.]

That is for the purposes of voting; it does not purport to define a "secured debt," which are the words used in sec. 37. A guarantee is as much a security as the promissory note of a third person.

Higgins in reply—A "secured debt" is a debt due to a "secured creditor," which sec. 67 (v.) shows must be a "security" over the insolvent estate. Sec. 122 refers to a creditor holding a "security" over the insolvent's property. The terms used in sec. 37 are "secured debt" and "security," and it is submitted that both of them refer to a security over the debtor's estate. The guarantee by Ellison was not over the debtor's estate, and was not, therefore, a security within the meaning of the section. Further, the security referred to in the section must be such as upon adjudication of sequestration can be given up to the assignee or trustee, and the guarantee to the bank could not be so given up, as it is not part of the insolvent estate and would be useless to him. It is submitted, therefore, that it is not such a security as is contemplated by the section. The bank is only doing its duty to the guarantor in trying to exhaust the primary debtor in the first instance.

Woolf in reply. *Cur. adv. vult.*

HODGES, J. This is a petition by the London Chartered Bank of Australia praying that the estate of John Gibson Whittles may be sequestrated. In this case an objection was raised by the

(*a*) 15 V.L.R., pp. 666-7.

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respondent that the petitioning creditor's debt was a secured debt within the meaning of sec. 37 of the *Insolvency Act* 1890, and as the petitioner had not stated in his petition that he was ready to give up such security for the benefit of the creditors after adjudication of sequestration, or was willing to give an estimate of the value of his security, it was urged by the respondent that he was entitled to have the petition dismissed. It was admitted that the security which the petitioner held was a guarantee from another person, and the question is whether a petitioner having the guarantee of another person makes his debt a secured debt. There is no doubt that a person who holds the guarantee of another person for the payment of the debt due has some security that the debt will be paid, which is good or bad according as the name of the guarantor is good or worthless. It would, I think, be difficult to say that a person who holds the guarantee of another person for the payment of a debt due has no security, so that apart from the section of the Act, and speaking generally, such a person would be described as a person having a secured debt, but even if that be so, he may not have a secured debt within the meaning of sec. 37 of the Act. That section provides that the petitioning creditor's debt

"Must not be a secured debt unless the petitioner states in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration."

Pausing there, for a moment, that language appears to point to some security which can be transferred to the trustee or assignee, and which, when transferred, will be, or may be, of some benefit to the creditors, but a trustee or assignee standing only in the shoes of the insolvent cannot derive for the creditors any benefit from the guarantee of a third person; and so it seems to me that as a guarantee of a third person is a security of such a character that the creditors could not receive any benefit from it, it is not a secured debt within the meaning of this section. The section then goes on to say:—

"Or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated; but he shall, on an application being made by the trustee within the prescribed time after adjudication of sequestration, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value."

That language again implies the right of the trustee to have the security handed over to him on payment of its estimated value. It was urged by the petitioner that the language of this section does not make this guarantee a secured debt, and I think that that contention is right. I think that the security must be something which can be taken over by the assignee or trustee for the benefit of the creditors. That view is, in my opinion, borne out by sec. 67, sub-sec. v., of the Act. That section defines a "secured creditor." It is quite true it does not define a secured debt, but a secured debt within the meaning of the Act would, one would expect, mean the debt of a secured creditor, and a secured creditor, one would apprehend, would be the holder of a secured debt. That sec. 67, sub-sec. v., defines a "secured creditor" to mean

"Any creditor holding any mortgage charge or lien on the insolvent estate or any part thereof, as security for a debt due to him."

So that a secured creditor is a creditor having a mortgage charge or lien on the insolvent estate, or on some part of it, and I think that a secured creditor is one who has a secured debt, and a secured debt is a debt which is secured by some mortgage charge or lien on the insolvent estate or some part of it. Sec. 122 of the Act, which provides that

"A creditor holding a specific security on the property of the insolvent or any part thereof may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realising or giving credit for the value of his security in manner and at the time prescribed,"

points also to my mind in the same direction, inasmuch as it gives to a creditor holding a specific security, after an individual has been made insolvent, the same rights as, on my construction of sec. 37 of the Act, are given to the petitioning creditor, and places the secured debt of a creditor in the same position as a secured debt held by a petitioning creditor. I think, therefore, that a secured debt within the meaning of sec 37, is a debt secured by some mortgage charge or lien on the estate of the insolvent or some part of it. This guarantee is not a charge on any part of the insolvent's property, and therefore the objection has failed, and the order will be made absolute.

Solicitors for petitioners: *Attenborough, Nunn & Smith.*

Solicitor for respondent: *Husband.*

A. J. A.

F.C.

1892
March 17, 24.
April 12.
August 2, 3.

IN RE KENNEDY, EXPARTE TATTERSON.

Insolvency Act 1890 (*No.* 1102), *s.* 37 (v.)—*Petition for sequestration—Act of insolvency—Execution levied by seizure—Security for debt—Valuation of security.*

Where execution issued against a debtor on a judgment recovered by a creditor has been levied by seizure, the creditor has a security for his debt; but, inasmuch as the property levied upon passes to the assignee or trustee of the debtor's estate upon adjudication of sequestration, the creditor, in petitioning for the sequestration of his debtor's estate on the ground that such process has not been *bonâ fide* satisfied within four days of seizure, need not state in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration, or give an estimate of the value of his security.

ORDER *nisi* for the sequestration of the estate of Daniel Kennedy, obtained on the petition of George Tatterson.

The order *nisi* alleged as an act of insolvency that an execution issued against Daniel Kennedy on a judgment for 52*l.* 4*s.* 11*d.*, recovered by the petitioner against the respondent on 15th February 1892, for the purpose of obtaining payment of the said sum, had been levied by seizure, and such process had not been *bonâ fide* satisfied by payment or otherwise within four days from the seizure.

The petition and affidavit in support of it, and the order *nisi*, alleged that the petitioner's debt was wholly unsecured.

The respondent gave a notice of objections which disputed the act of insolvency and the petitioning creditor's debt, and also gave notice that he would rely on a number of special defences, including the following:—

5. That, in fact, there was not any levy, by seizure made upon any property of mine.

6. That if there were any such levy, the property seized at the time of the presentation of the said petition was, and still is, in the hands of the sheriff, and constituted a security for the petitioning creditor's debt, and costs of action, or one of them.

7. That since the said alleged seizure the petitioner has received and taken into, and now has in, his own custody part of the property seized, and has a security for his alleged debt.

8. That the allegation in the said order *nisi* that the petitioner's said debt is wholly unsecured is untrue in substance and in fact.

9. That the petitioner having caused the execution referred to in the order *nisi* to be levied by seizure of my property (if it be my property), he cannot avail himself of the alleged act of insolvency.

Woolf for the petitioner moved the order absolute.

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Isaacs for the respondent showed cause, and took a preliminary objection that the petitioner held a security for his debt over the goods seized by the sheriff, and that he ought in his petition to have either stated that he would give up such security for the benefit of the creditors, or have given an estimate of its value.

Woolf contra.

Cur. adv. vult.

April 12.

HOLROYD, J. The petition in this case alleged that Kennedy was indebted to the petitioner in the sum of 52*l.* 4*s.* 11*d.* by virtue of a judgment of the Supreme Court recovered against him by the petitioner on the 15th of February last; that the debt was wholly unsecured; and that Kennedy had committed acts of insolvency, one of them being that an execution issued against him on the said judgment had been levied by seizure and that such process had not been *bonâ fide* satisfied by payment or otherwise within four days from the seizure. It was submitted for the respondent by way of preliminary objection to the validity of the order *nisi*, that when the petition was presented the petitioning creditor held a security for his debt over the goods seized by the sheriff, and that the petitioner ought in his petition either to have stated that he would be ready to give up his security for the benefit of the creditors after adjudication of sequestration, or to have given an estimate of its value, which he had not done. The objection is not a technical one, but raises a point of considerable importance. A writ of *fi. fa.*, when delivered to the sheriff to be executed, binds the goods of the debtor in general, subject to such title as may be acquired by any person *bonâ fide* and for value before actual seizure and without notice of the delivery of the writ, but after seizure the specific goods seized are bound: *Supreme Court Act* 1890, secs. 174, 176. An execution creditor in England, who had obtained and served a garnishee order *nisi* under secs. 61 and 62 of "*The Common Law Procedure Act* 1854" before the bankruptcy of the debtor, was held to have security for his debt within sec. 184 of the English Bankrupt Law Consolidation Act of 1849: *Holmes* v. *Tutton* (*a*); and see *Hutton* v. *Cooper* (*b*). Similarly a garnishee

(*a*) 5 El. & B. 65.

(*b*) 6 Ex. 159.

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order *nisi* after service, as well as a garnishee order absolute, obtained before bankruptcy, has been held to constitute a security upon the property of the bankrupt within the 12th section of the English Bankruptcy Act of 1869, and also to be a charge on part of the bankrupt's estate within sub-sec. 5 of sec. 16 of the same Act: *Emanuel* v. *Bridger* (*c*); *Lowe* v. *Blakemore* (*d*); and see *Watson* v. *Morrow* (*e*). The reason for determining the garnishee order to be a security rested upon its resemblance to the seizure of goods by a sheriff under a writ of execution, and it seems never to have been for a moment questioned that goods which had actually been seized under a writ of *fi. fa.* fell within the compass of the word security apart from any special definition of that word. Sub-sec. 5 of sec. 67 of the *Insolvency Act* 1890 is an exact copy of sub-sec. 5 of sec. 16 of the English Bankruptcy Act of 1869, and runs thus: "A secured creditor shall in this Act mean any creditor holding any mortgage, charge, or lien on the insolvent estate or any part thereof as security for a debt due to him." There is nothing in the *Insolvency Act* which expressly limits the meaning of the word security to such securities as continue to exist after an order *nisi* for sequestration has been signed, or after the order *nisi* has been made absolute. It is however in the 76th section provided that the sheriff must not sell any property under any process for the sum of 50*l.* or upwards until after eight days from the seizure, and if the property is sold he is to retain the proceeds for four days after the sale, and if a sequestration of the debtor's estate takes place within that time the sheriff is to hand over the proceeds to the assignee or trustee. By the same section the further execution of any judgment or process against the property of an insolvent is directed to be stayed after an order of sequestration of his estate has been made, but the person having right to such judgment may prove his debt against the insolvent estate; and where any property has been seized by legal process and not sold, such property is to be placed under sequestration in the same manner as any other part of the insolvent estate. Sec. 77 enacts that no action shall be brought against an insolvent for a debt provable in insolvency, and all proceedings in an action then pending shall upon an order of sequestration being made be

(*c*) L.R. 9 Q.B. 286. (*d*) L.R. 10 Q.B. 485. (*e*) 6 V.L.R. (L.) 134.

stayed, and the plaintiff in the action may prove his debt together with the taxed costs of it then incurred against the insolvent estate; but any creditor who shall be prevented by the sequestration of the debtor's estate from proceeding to sell under an execution levied before the order of sequestration was made shall be entitled to be paid his taxed costs incurred in the action under which such execution issued and not exceeding 50*l.* out of the proceeds of the insolvent estate. It seems from these enactments pretty clear that as soon as an order *nisi* for sequestration has been signed the creditor's security over goods seized under a *fi. fa.* is temporarily suspended, and if the order *nisi* is affirmed his security is gone. Such costs as he is to get in that event are to be paid out of the proceeds of the insolvent estate generally, and not out of the proceeds of the particular goods seized. If the order *nisi* is subsequently discharged, I apprehend that the security revives in its full vigour. It has been argued that it would be impossible for the petitioner to estimate the value of his security when at the time of presenting the petition it may be worth a large sum, but may vanish on the order being made absolute, and that it is ridiculous to ask the petitioner to give up for the benefit of the creditors after the debtor's estate is adjudged to be sequestrated something which by the very fact of adjudication will become absolutely vested in the assignee or trustee. That is certainly a very forcible argument, for when the law compels a man to do a thing, or rather does it for him, it seems superfluous to ask him to express his readiness to do it. Nevertheless the fact remains that the petitioning creditor's debt was secured at the time when the petition was presented, and that if I discharge this order *nisi*, it will continue to be secured. Though it might have been superfluous, yet it was not impossible for the creditor to express his readiness to give up his security after adjudication, which was all that could have been required of him. Its value he was permitted but not bound to estimate. The solution of the difficulty probably is that the case of an execution creditor, attempting after the sheriff had levied on the property of his debtor to sequestrate the debtor's estate because process had not been wholly satisfied by the seizure, was never contemplated by the Legislature. The petition does not set forth whether the goods seized were sufficient to satisfy

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any portion of the debt, which in the whole including interest barely exceeded the statutory minimum.

With some hesitation I give effect to the preliminary objection, and discharge the order *nisi* with costs.

August 2, 3.

From this decision the petitioner appealed to the Full Court [*Coram* HIGINBOTHAM, C.J., A'BECKETT AND HOOD, JJ.].

Woolf for the petitioner appellant—It is submitted that the petitioner did not hold any mortgage charge or lien on the insolvent estate within the meaning of sec. 67, sub-sec. 5, of the *Insolvency Act* 1890 (No. 1102), and he was not, therefore, according to that sub-section, a secured creditor.

[A'BECKETT, J. There is, in a case like this, under sec. 37, sub-sec. 5, no insolvent estate over which he could hold security, because the moment the estate is made insolvent the so-called security goes.]

It is not insolvent; it is to be deemed to be sequestrated until the order *nisi* is made absolute or discharged, but the adjudication of sequestration does not take place till the order *nisi* is made absolute: sec. 4. As soon as the estate is adjudged to be sequestrated, the sheriff has to quit possession of the seized goods and hand them over to the assignee: sec. 76. The security is gone, and certainly cannot, as the Act contemplates and intends, by requiring the petitioner to state that he will be ready to give up his security for the benefit of his creditors after adjudication, or to give an estimate of its value and give up the same to the assignee at that value, be given up for the benefit of his creditors. It is submitted that the term "security" in sec. 37, read by the light that may be gathered from the definition of "secured creditor" in sec. 67 (v.) means such a mortgage charge or lien over the insolvent estate as is capable of being given up by the creditor for the benefit of all the creditors after the adjudication of sequestration of the estate. The English cases of *Emanuel* v. *Bridger* (*f*) and *Lowe* v. *Blakemore* (*g*), which Holroyd, J.,

(*f*) L.R. 9 Q.B. 286. (*g*) L.R. 10 Q.B. 485.

followed, were decided on the Act 32 & 33 Vict., c. 71, sec. 12, which differs from ours most materially, for the security under a seizure by the sheriff remains under that Act, while under sec. 76 of our Act it absolutely goes on the order *nisi* being made absolute.

[HOOD, J. I am inclined to think that the security must be given by the debtor to the creditor. If a creditor insured his debtor's life at his own expense I do not think he could be said to hold a security within the meaning of sec. 37.]

Yes, it must be on the insolvent's property. The provision in the Act, as to proving debts after adjudication of sequestration (sec. 122), says that a creditor holding a "specific security" on the property of the insolvent may, on giving up his security, prove for the whole debt or be entitled to a dividend in respect of the balance after giving credit for the value of his security.

[A'BECKETT, J. The creditor presents a petition in a case in which it is quite useless for him to value his security or offer to give it up, because the law takes it from him on the order being made absolute. It cannot be suggested that it would be any use to anybody to state it, but, of course, if the Act requires it it must be done.]

Further, the petitioner is not in possession either by himself or by his agent of the goods, the possession of which is said to be a security—in fact he may even purchase them at the sheriff's sale—they are *in custodia legis*: *Stratford* v. *Twynam* (*h*).

Isaacs for the respondent—The terms of sec. 37 do not require any reference to the definition clauses of the Act. Sec. 37 gives a certain statutory right only if certain conditions are complied with—that right is not given to a person holding a security at the time of the presentation of his petition unless he either offers to give it up or gives an estimate of its value.

[HOOD, J. Suppose a petitioner had an illegal or void security at the time of presenting his petition, must he offer to give it up or estimate its value?]

No, for it would not be a legal security. In this case it is of avail against the creditors until the order is made absolute or discharged. During that time no other creditor can touch the goods seized.

(*h*) Jacob 418.

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It is submitted that the security referred to in sec. 37 must be a security over the debtor's property, and this execution is according to the cases of *Emanuel* v. *Bridger* (*i*); *Lowe* v. *Blakemore* (*k*), and *Watson* v. *Morrow* (*l*); clearly a security over his property.

[A'BECKETT, J. Under the English Act does not the creditor get a benefit at the expense of the estate?]

Yes; but at the date of the presentation of the petition, both under the English Act and our Act, a "secured creditor" means the same thing.

[A'BECKETT, J. The very fact of his going under this subsection shows the judge to whom the petition is presented that he has this security, if it be a security.]

Even if he stated that he was secured in this way, he would not go far enough; he must offer to give up the security, or estimate its value.

[A'BECKETT, J. Does not he impliedly offer to give up the security? It goes for the benefit of the creditors if he gets that for which he is applying—the adjudication of sequestration of the estate.]

That would be inconsistent with his express statement here that he is wholly unsecured. If the order *nisi* is refused, the creditor retains his security, his priority over other creditors.

[A'BECKETT, J. If there is a security at the time of presenting the petition, and if the provisions of the Act give no option to the creditor as to whether he will or will not give up the security, so that the trustee could not exercise the option which is given him in the cases of other creditors valuing their security, is not that a reason for holding that in the particular case the provisions as to valuing the security are inapplicable.]

The petitioner has still an option of either retaining his security or offering to give it up; for as to the costs of execution he has a security over the proceeds of the insolvent estate in the hands of the assignee (secs. 76 and 77). From the time the execution is levied till the estate is realised and himself paid he has security for those costs.

[HIGINBOTHAM, C.J. Was this objection taken below?]

(*i*) L.R. 9 Q.B. 286. (*k*) L.R. 10 Q.B. 485. (*l*) 6 V.L.R. (L.) 134.

It was included in the notice of objections, and I stated to the learned judge that unless it was admitted I was prepared to prove that the judgment was for 45*l.* 6*s.* 1*d.*, and costs of judgment 6*l.* 8*s.* 10*d.*

[*Woolf*—The objection already argued was the only one dealt with. It was taken as a preliminary objection, and although there were a number of other special defences, they were not dealt with.]

We state that petitioner had security for the costs, and the question is whether he had a proper petitioning creditor's debt clear of security.

[HIGINBOTHAM, C.J. Is not the right to the costs of execution merely a preferential claim, not a security?]

The trustee must pay them before any preferential claims. His security is not over the estate, as it comes into the trustee's hands, but over the proceeds of it when sold. The interest of a plaintiff in an execution under which a sheriff has seized and is in possession of goods is a "security" within the meaning of the Act: *Slater* v. *Pinder* (*m*).

HIGINBOTHAM, C.J. In this case a preliminary objection was taken on the return of the order *nisi* for sequestration that the petitioner ought in his petition either to have stated that he would be ready to give up his security, which he had obtained by seizure under a *fi. fa.* on his judgment, for the benefit of the creditors after the adjudication of sequestration, or to have given an estimate of its value, and that he had done neither, and therefore that his petition was not in accordance with the provisions of sec. 37 of the *Insolvency Act* 1890. That section is as follows :—

The debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated; but he shall, on application being made by the trustee within the prescribed time after adjudication of sequestration, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value.

(*m*) L.R. 6 Ex., p. 237.

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The learned primary judge, with some hesitation, acceded to the argument urged against this petition, and gave effect to it, and we have now to say whether that view is correct. The objects of these provisions of the 37th section appear to be, first, to carry out the enactment in the earlier part of the section, that a compulsory sequestration shall not take place except upon the petition of a creditor to whom a sum of not less than 50*l.* is due; and, secondly, to secure an equal distribution of the whole of the property of the person sought to be made insolvent for the benefit of the whole of the creditors, and this provision, on which this question arises, must be viewed in its relation and its tendency to effect those objects of the section. It is contended that, according to the strict terms of this section, the creditor has a secured debt by virtue of the seizure of the property of the debtor under the *fi. fa.* On the other hand, it is contended, and, we think, with effect, that this provision refers to securities which will pass to the trustee or assignee of the insolvent if he be made insolvent, and which may be used by the trustee or assignee for the purpose of bringing the claim within the provisions of the Act. We think that this provision is not applicable to the case of a debt secured as this debt was secured. The terms of this provision expressly apply to a case in which the trustee can after an adjudication of sequestration call upon the creditor either to give up his security altogether or to value it, and give the trustee the option of purchasing it at the value fixed by the creditor. Now, those provisions are wholly inapplicable to this particular security, admitting it to be a security at all. For by the terms of the 76th section of the Act this security as soon as the order *nisi* for sequestration is signed becomes suspended, and if the order *nisi* be made absolute the security is extinguished, and the property passes unencumbered into the estate and is divided amongst the creditors. The objects of this provision are not aided in any degree by the duty which it is alleged lies upon the petitioner. There is no valid result following from his declaring his readiness to give up his security for the benefit of the creditors after adjudication of sequestration, because the law provides that after that the security, whether he is ready or not, passes to the assignee for the benefit of the creditors. It is said that a petitioning creditor must either state his readiness to

give up his security or else set a value upon it, but that is entirely inapplicable to a case of this kind, for the security here passes completely to the trustee or assignee, and it is unnecessary that an estimate should be given of the value of a security which the creditor has no power either to give up or to hand over to the trustee upon a valuation arrived at by himself. The express provisions of this part of the section appear to us to be wholly inapplicable to the case of a secured debt secured in this way, viz., by seizure under a writ of *fi. fa.* on a judgment, and consequently that those provisions do not apply to a case of this kind, and a petitioning creditor is not bound in a case of this kind to make either of these statements in his petition. The cases which have been referred to, and are referred to in the judgment appealed from, certainly go to show that a debt of this kind is a secured debt, but they go no further, and the difference between the English Bankruptcy Act and our *Insolvency Act* with respect to the right of a creditor holding a security of this kind deprives those cases of any authority bearing upon the question which we have to deal with. We are of opinion, therefore, that the decision of the learned primary judge on this preliminary objection was wrong. The appeal will be allowed with costs, but as there are other objections to this order *nisi* the case will be remitted for rehearing, and the order *nisi* will be made returnable on the 11th of August.

Solicitor for petitioner: *Herald.*
Solicitors for respondent: *Crisp, Lewis & Hedderwick.*

A. J. A.

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June 28, 29, 30. *Oct.* 1.

GLEESON *v.* YEE KEE AND ANOTHER.

GLEESON *v.* MOW SANG AND OTHERS.

Gaming—Police Offences Act 1890 (*No.* 1126), *Part IV.—Keeping a common gaming house—Chinese lottery—Evidence—Irregularity in procedure.*

Keeping a house for the purposes of carrying on a Chinese lottery, whether such house be used for the sale of tickets or for the drawing of the lottery, constitutes the offence of keeping a common gaming house within the provisions of Part IV. of the *Police Offences Act* 1890.

Previous to the hearing of a charge against the defendants, another charge against some of the defendants had been heard by the same justices. The defendants were represented by counsel, and the prosecuting counsel proposed for the sake of convenience that the evidence of three Chinese witnesses, which had been taken on the hearing of the previous charge, should be read and admitted as evidence against the defendants. Counsel for the defendants accepted this proposal, and thereupon the evidence was admitted by the justices.

Held, that the evidence was not wrongfully admitted, because although the procedure was irregular, and was not excused by necessity, yet the irregularity was slight and unattended by any unfair consequences to the accused, and was not such a failure or miscarriage of justice as to constitute a mis-trial.

THESE two and four other orders *nisi* to review decisions of justices were argued together.

The facts and arguments appear in the judgment.

C. A. Smyth to show cause.

Madden and *Leon* to move the rule absolute.

The following authorities were cited:—*Rattray* v. *Roach* (*a*); *Ah Sue* v. *Call* (*b*); *R.* v. *Sturt, exp. Ah Tack* (*c*); *Jacobs* v. *Jennings* (*d*); *R.* v. *Whelan* (*e*); *R.* v. *Bertrand* (*f*); *Tollett* v. *Thomas* (*g*); *Hirst* v. *Molesbury* (*h*); *Jenks* v. *Turpin* (*i*); *R.* v. *Foster* (*k*); *R.* v. *Thornhill* (*l*); *R.* v. *Crawshaw* (*m*).

Cur. adv. vult.

(*a*) 16 V.L.R. 165.
(*b*) 12 V.L.R. 178, at p. 182.
(*c*) 2 V.L.R. (L.) 103.
(*d*) 1 V.L.R. (L.) 172.
(*e*) 3 W. W. & A'B. (L.) 7.
(*f*) L.R. 1 P.C. 520.
(*g*) L.R. 6 Q.B. 513.
(*h*) L.R. 6 Q.B. 130.
(*i*) 13 Q.B.D., at p. 530.
(*k*) 7 C. & P. 494.
(*l*) 8 C. & P. 575.
(*m*) Bell's C.C. 303.

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GLEESON v. MOW SANG.

HIGINBOTHAM, C.J. These and four other cases of orders to review have been argued together. These two appellants and four other Chinamen were arrested in two Chinese lottery shops under a special warrant issued under sec. 57 of the *Police Offences Act* 1890, and were brought before justices. Two of the appellants, Yee Kee and Mow Sang, were thereupon convicted and fined under sec. 58 for being the keepers respectively of a common gaming house. The remaining four were convicted and fined under the same section for assisting in conducting the business of a common gaming house. The first question raised by these orders to review is whether there was any evidence that the lottery shops in which these men were arrested were common gaming houses within the provisions of Part IV. of the *Police Offences Act* 1890. By sec. 50 it is provided that—

"Every house room office or place open kept or used for the purposes in the last mentioned section or any of them shall be taken and deemed to be a common gaming house."

The preceding section (49) prohibits the opening, keeping, or using of any house, office, room, or other place for the purpose—(1) of the owner, occupier, keeper thereof, or any person using the same, "betting with persons resorting thereto"; or for the purpose (2) of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration of any assurance, undertaking, promise, or agreement to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other enumerated games. The section proceeds to declare that every house, office, room, or other place open, kept, or used for the purposes aforesaid, or any of them, is a common nuisance and contrary to law.

It has been contended that the purpose of "betting," which is the first-mentioned purpose in this section, is limited to the games enumerated in the latter part of the section describing the purposes secondly mentioned. None of the games here enumerated is an unlawful game in the sense of being expressly or by necessary implication prohibited by law. The game played in the cases now under consideration was a lottery within the meaning of sec. 37 of the *Police Offences Act* 1890, and is prohibited by law. The argument, then, is that these two lottery shops are not common

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gaming houses because, although they were kept and used for the purpose of betting with persons resorting thereto, the betting was in an unlawful game, and not in any of the lawful games specially enumerated in sec. 49. This contention is substantially the same as was raised and overruled in *Jacobs* v. *Jennings* (*n*). It is not warranted, in my opinion, by the proper meaning of the word "betting," or by its use in the place where it is found in this section, according to the true construction of the section. "Betting" means a laying on, a staking or pledging, something in a game or contest. The game in which betting takes place may be a lawful or an unlawful game. Gaming may be unlawful either by reason of the game itself being prohibited by law, or by reason of the game, although not unlawful, being carried on in an unlawful place. In like manner "betting" is not in itself and in all cases unlawful, but it is unlawful if it is carried on in a manner or in a place prohibited by law. The intention of the Legislature in this sec. 49 and the following sections is, in my opinion, clear and clearly expressed. The Legislature does not attempt to prohibit "betting" generally by all persons in all places, but it does prohibit betting absolutely on any event or contingency of any game, lawful or unlawful, when the betting is carried on by certain persons in certain places, and it does this by making the persons liable to punishment and by declaring the place to be a common nuisance and a common gaming house. There was evidence that these two lottery shops were kept and used for the purpose of betting on an unlawful game, namely, a lottery, and that they were, consequently, common nuisances and common gaming houses. The first objection to this conviction therefore fails.

It appeared by the evidence that the lottery money was paid, and that the tickets were issued to players in the lottery shops, and that the lottery was drawn, and the winning characters were marked off in another house called the "bank;" and it was contended further, that, under these circumstances, the "bank" alone, and not the lottery office, was a common gaming house, and that the keepers and conductors of the "bank" are alone liable under sec. 58. But I think that any house or room in which any necessary part of the business of the lottery is carried on, and the

(*n*) 1 V.L.R. (L.) 172.

keeper and conductors of any such house or room, are within the provisions of the section. This objection also fails.

Previously to the hearing of the charges against the six defendants, another charge against the keeper and conductors of the "bank" had been heard by the same justices. The six defendants were represented by counsel or solicitors, and it was proposed by the counsel for the prosecution, for the sake of convenience, that the evidence of three Chinese witnesses, which had been taken on the earlier hearing, should be read and received as evidence against the defendants. This suggestion was accepted by the counsel and the solicitors for the accused, and thereupon the evidence was admitted by the justices. The alleged wrongful admission of this evidence forms the second ground of the present order *nisi* to review. In *Regina* v. *Bertrand* (*o*) it was observed with reference to a similar course taken in that case at the request of the prisoner and his counsel, and with the consent of the counsel of the Crown, that

"It is a mistake to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even when he is advised by counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession that a prisoner can consent to nothing. . . . . Their lordships do not pronounce that anything amounting in law to a mis-trial can be fairly charged on the course pursued. Neither, of course, do they intend to press their remarks in cases where a necessity exists (which is not alleged here), nor to the literal and entire exclusion of the reading any part of the evidence with the guards used on this occasion. The part may be so unequivocally formal, or so short, as to make their remarks inapplicable, but their lordships do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the jury, which was adopted on this trial."

We entirely concur in the wisdom of these remarks, and have recently given effect to them in a case—*Rattray* v. *Roach* (*p*)—where both parties consented to a conviction being entered against the accused although no evidence had been given, with a view of obtaining by this highly irregular means the opinion of this Court on a question of law. In the present case, however, although the procedure was irregular, and was not excused by necessity, we are of opinion that there was not such a failure or miscarriage of justice as constituted a mis-trial. We do not approve of the course

(*o*) L.R. 1 P.C., at pp. 534-5. (*p*) 16 V.L.R. 165.

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that was suggested to and adopted by the justices, and our decision must not be taken as a precedent in future cases; but in the circumstances of this case we think that the irregularity being slight, and unattended by any unfair consequences to the accused, should not be allowed to avoid the decision, and that a rehearing of the charges is not necessary.

On both grounds of the orders, therefore, the appellants have failed to support their objections to these convictions. The orders to review will be discharged with costs.

HOLROYD, J. The defendant Yee Kee was convicted of being the keeper, and the defendant Ah Lum of assisting in conducting the business, of a common gaming house. The house kept by Yee Kee was used for the sale of tickets for Chinese lotteries. A Chinese lottery is a game of pure chance, but one in which the chances are vastly more favourable to the bankers or other persons by whom the game is managed than to the rest of the players. The game consists of two parts. Selling the tickets is one part, and an important part of the game. Tickets that are for sale are inscribed with a certain number of Chinese characters, and on every ticket that is purchased ten of these characters have to be cancelled or defaced, either by the purchaser or by anybody whom he allows to perform the operation for him. Each such ticket is distinguished by the number of the bank and the day of the month in figures. Paying sixpence for his ticket, and marking off the characters, is all the play the purchaser has to do, except that on the very rare occasions when he wins he comes to the shop at which he bought his ticket to receive his money. How the drawing of the lottery, which is called drawing the bank, is conducted the evidence does not disclose; but in this case, whatever the process may be, it took place in another house. Ah Lum disposed of the tickets and took the money for them, and marked off on corresponding tickets the characters cancelled by the purchasers, and these corresponding tickets for each bank were carried away to the house where the drawing was done, and when that was finished the winning tickets were brought back to Yee Kee's. Neither house, so far as the proof went, was used for playing the whole game; but, as it seems to me, each house was used for playing *at* the game, and from the

nature of the game such a use would make each a common gaming house. Every man who performs his part in any game plays at the game, and the players who staked their sixpences at Yee Kee's played at the game there or nowhere. I doubt if a Chinese lottery is included in the class of games specified in sec. 49 of the *Police Offences Act* 1890, or if paying for a ticket constitutes betting within the meaning of that section. On the second ground on which the order to review was obtained I concur with the Chief Justice.

HIGINBOTHAM, C.J., read the judgment of Hodges, J. I desire to express in as few words as possible my reason for concurring in the conclusion arrived at by the Chief Justice and by my brother Holroyd. Yee Kee has been convicted under sec. 58 of the *Police Offences Statute* 1890 of being the keeper of "a common gaming house," and it is contended on his behalf that there is no evidence that the house he kept was "a common gaming house." There is no real dispute as to his having kept a certain house, or as to what was done in that house; the dispute is as to whether what was done in the house makes the house a common gaming house within the meaning of the 58th section of the *Police Offences Statute*. That section speaks of "the said gaming house." These words refer us back to the previous section, which deals with "a complaint made before a justice on oath that there is reason to suspect any house, room, premises, or place to be kept or used as a common gaming house." Consequently, the words "said gaming house" in sec. 58 include substantially any "common gaming house" within the meaning of the Act. Sec. 49 enacts that—

"No house office room or other place shall be opened kept or used for the purpose of the . . . keeper thereof . . . betting with persons resorting thereto or for the purpose of any money . . . being received by or on behalf of such . . . keeper . . as or for the consideration for any assurance . . to pay or give thereafter any money . . . on any event or contingency of or relating to any horse race or other race fight game sport or exercise . . . and every house office room or other place opened kept or used for the purposes aforesaid or any of them is hereby declared to be a common nuisance and contrary to law."

Then sec. 50 declares that—

"Every house room office or place opened kept or used for the purposes in the last mentioned section or any of them shall be taken and deemed to be 'a common gaming house.'"

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Therefore, if the premises kept by the appellant were "opened, kept, or used" for any of the purposes mentioned in sec. 49, the place was a "common gaming house" within the meaning of the *Police Offences Statute* 1890. The appellant objects that sec. 49 only applies to betting on "any horse race or other race fight game sport or exercise." This contention is contrary to the view expressed by the Full Court in *Jacob* v. *Jennings* (*q*). I see no reason to doubt the correctness of the decision in that case. In my opinion that decision is in accord with the grammatical construction of the section, and no sufficient reason has been adduced to lead me to think that the Legislature did not mean what it has said.

It was then urged for the appellants that what took place in this case was not "betting." What took place may be shortly stated in this way: Appellant kept a shop. In this shop he sold to as many as liked to buy, for 6*d.* each, tickets with twenty Chinese characters on them. The purchaser crossed out ten of these characters. If eight of these so crossed out corresponded with eight crossed out on a similar ticket drawn out of what is called a bank, the appellant paid the purchaser 21*l.* This I take to be the purchaser betting 6*d.* to 21*l.*—that he in striking out ten characters will strike out eight of the same that are struck out on the ticket in the bank. If this be not betting, I am afraid I do not know what betting is. I am therefore of opinion that these premises were used by the appellant for the purpose of his betting with persons resorting thereto within the meaning of sec. 49, and that the premises were therefore a common gaming house within the meaning of sec. 50, and consequently of sec. 58. As to the impropriety of conducting an investigation in the manner in which this was conducted, I have nothing to add to what has been said by the Chief Justice, and am therefore of opinion that the appeal should be dismissed.

For similar reasons the other appeals should, in my opinion, be dismissed.

Solicitors for the appellants: *Jamieson*; *Lyons & Turner*.
Solicitor for the respondent: *Guinness*, Crown Solicitor.

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(*q*) 1 V.L.R. (L.) 172.

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Nov. 12, 28.
Dec. 5.

Practice—Order LXV., r. 12—Taxation of costs—Action whether founded on contract or tort.

A contractor brought an action against an architect for dishonestly, corruptly, and fraudulently withholding from him the final certificate under the contract. The jury having given a verdict for a sum less than 50*l.*, the taxing master, upon taxation, held that the action was not founded on contract within the meaning of Order LXV., r. 12, and that the plaintiff was not restricted to County Court costs.

Held, by the Full Court (affirming Williams, J.), that the decision of the taxing master was correct, and that the action not being founded on contract, Order LXV., r. 12, did not apply.

REVIEW of taxation.

The action was brought by a contractor against an architect, and the claim was for dishonestly, corruptly, and fraudulently having withheld from the plaintiff a final certificate. The taxing officer treated this as an action of tort, and not of contract, and held that therefore, under Order LXV., r. 12 (*a*), the plaintiff was not precluded from having his costs taxed on the higher scale. From this decision the defendant now appealed.

Kilpatrick in support—This is an action founded on contract; it is founded on an implied tripartite contract between the employer, the contractor, and the architect. The architect is chosen by the employer, and accepts certain duties in carrying out the contract. One of those duties is to act honestly and fairly to the contractor in the course of carrying on the work under the contract which the architect is employed to supervise by his employer. If the architect fails to carry out this duty, then an action lies against him on his implied contract to do so.

Mitchell, for the plaintiff, to oppose—This is not an action founded on contract, it is one of tort; it is only maintainable if fraud be proved. Where a person has been guilty of fraud, then

(*a*) Order LXV., r. 12:—"In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the court or judge otherwise order."

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whether there is any contractual relation or not between him and the party injured an action for damages will lie. It must be shown that this is necessarily an action founded on contract.

The following authorities were cited: *Stevenson* v. *Watson* (*b*); *Denman, J.*, at p. 160; *Bryant* v. *Herbert* (*c*); *Pontifex* v. *Midland Railway Co.* (*d*); *Thomson* v. *Equitable, etc., Society* (*e*); *Young* v. *Ballarat Water Commissioners* (*f*); *Young* v. *Bagge* (*g*); *Addison on Contracts* (9th ed.), 892; *Bullen & Leake* (3rd ed.), pp. 57, 59, 554; *Fleming* v. *Manchester, etc., Railway Co.* (*h*); *Pappa* v. *Rose* (*i*); *Tharsis Sulphur, etc., Co.* v. *Loftus* (*k*).

Cur. adv. vult.

WILLIAMS, J. This was an application on behalf of the defendant to order a review of the taxation of the costs in the action. The action was one by the contractor against an architect under a contract with the employer. The claim against the architect was for having dishonestly, corruptly and fraudulently withheld from the plaintiff the final certificate. The taxing officer treated that as an action not founded on contract but as an independent action of tort. It was contended that it was an action founded on contract within the meaning of Order LXV., r. 12, and that therefore the plaintiff should recover no more costs than he would have been entitled to if he had brought his action in the County Court.

The first question to be considered is what is the meaning of the words "founded on contract" in Order LXV., r. 12. I agree with counsel that these words have to be given a wide interpretation. These words do not mean the same thing as "action *of* contract." I think the words "founded on contract" mean founded on a contract *inter partes*. In this case, applying that principle, this would be an action founded on a contract between the contractor and employer. Then Mr. Kilpatrick contended that, assuming that that was the limitation, there

(*b*) 4 C.P.D. 148.
(*c*) 3 C.P.D. 189 and 389.
(*d*) 3 Q.B.D. 23.
(*e*) 14 V.L.R. 255.
(*f*) 4 V.L.R. (L.) 306.
(*g*) 4 V.L.R. (L.) 519.
(*h*) 4 Q.B.D. 81.
(*i*) L.R. 7 C.P. 32.
(*k*) L.R. 8 C.P. 1.

was a contract here and in all this class of cases, between the contractor and the architect, and that this action, though it sounds in tort, is really an action for breach of contract, and that it is founded on contract though the claim charges the defendant with having fraudulently withheld the certificate. Counsel contended that this claim meant that the defendant had not honestly performed the functions he contracted to perform under the contract. I believe it has never been decided what is the nature of this class of action. It is only necessary to refer to the case of *Stevenson* v. *Watson* (*l*) to show that up to that date the point had not been decided. Denman, J., there says: "I think therefore that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to an action. If he honestly performs them then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions and the parties must abide by it." That shows that in that learned judge's opinion it was not at all clear whether the action arose out of an implied contract between the contractor and architect, or whether it was an action founded on a duty which was cast upon the architect by reason of a contract between *him* and the architect's employer. I think it is necessary now to decide this point, because if the foundation of this action is the implied contract between the architect and employer, then I am inclined to think, though I have great doubt, that this case would fall within the rule referred to. For the same reason I am inclined to think that actions brought against a doctor where the doctor undertakes to perform a certain operation for the patient, would be actions founded on contract, on a contract between the doctor and patient that the former would, with reasonable skill, perform the operation. If that class of case should arise again, I think it would come within the meaning of this rule. I was very much pressed with the argument that this was an action founded on contract. It was contended that the architect by allowing himself to be named as architect in the contract, and by accepting certain duties under the contract and performing those duties, entered into a contract with the employer and the contractor that so long as he

(*l*) 4 C.P.D., p. 162.

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remained the architect under that contract (of course there is no obligation to fulfil that position from the beginning to the end of of the work) but so long as he remained the architect under that contract and continued to perform the functions under the contract, he bargained to perform those duties honestly both with the employer and contractor, and it was urged that this action was one brought against him for having dishonestly performed that contract. I have come to the conclusion chiefly upon the ground that the words "founded on contract" relate to a contract *inter partes*, that the contract in this case is one between the contractor and employer. There is also, no doubt, a contract between the architect and employer, and the architect is paid by the employer and is employed by him. It is a sort of double-barrelled contract between employer and architect and employer and contractor. I cannot see, and I cannot satisfy myself that there is any contract between the architect and contractor so as to bring this case within the meaning of rule 12. There is a duty cast upon the architect by reason of his contract with the employer and by reason of the position which he occupies under the contract with the employer to perform his duties honestly to all parties interested in the performance of those duties under the contract. The contractor is one of those parties, and if he suffers damage by reason of the dishonest performance of that duty the architect is liable in damages. I think that that shows that the action is not one founded on contract; it is an action independent of contract. There is no contract whatsoever between the contractor and architect, and, therefore, the rule does not apply. It is a matter over which I have felt a great deal of doubt, and, under all the circumstances, I shall dismiss the summons without costs.

W. H. M.

From this decision the defendant appealed to the Full Court.

Kilpatrick for the defendant appellant.

Mitchell for the plaintiff respondent.

The arguments sufficiently appear in the report of the hearing before the learned primary judge.

HIGINBOTHAM, C.J. The question raised by this motion is whether this is an action founded on contract within Order LXV., r. 12, so as to require taxation of costs on a particular scale.

It has been contended by Mr. Kilpatrick with considerable ingenuity that this action, although it purports to be an action for fraudulently, dishonestly, and corruptly withholding from the plaintiff a certain final certificate, is in reality an action founded upon an implied tripartite contract between the employer, the contractor, and the architect. No direct authority was cited in support of that contention, and I do not think that any authority could be cited which would show that an architect under an ordinary building contract stands in any contractual relation with the contractor. There is a contract between the employer and the contractor, and there is also a contract between the employer and the architect, and the contractor is entitled under his contract with the employer to receive payment in certain cases upon the certificate to be given by the architect, but that right of the contractor to be paid by the employer on the certificate of the architect does not arise out of any implied contract between the architect and the contractor. The class of cases which has given rise to this question is dealt with in *Boorman* v. *Brown* (*m*), which clearly points out that in certain cases actions of tort may be founded on contract. At p. 525 of the report Tindal, C.J., says "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort, is not disputed." Then after giving a number of instances, and referring to two cases, the learned Chief Justice continues, at p. 526:—"The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort." The right in that class of cases then, to bring an action on tort, is confined within the same limits as the right to bring an action on contract. The tort must be committed between the same parties between whom the contract is, and there is no authority to show that a person can bring an action of tort arising out of a contract to which he himself is not a party. Actions against

(*m*) 3 Q.B. 511.

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architects alone have been of recent introduction. Originally it was supposed that a contractor could only sue an architect by alleging and proving collusion between the architect and the employer, but the case of *Young* v. *Bagge* (*n*) decided that an action could be brought against an engineer independently of his employer upon proof by the contractor that the engineer dishonestly neglected to perform his duty as engineer, even though, as was considered in that case, the engineer had not been acting in collusion with the employer. In that case no collusion was alleged, and the declaration was demurred to on that ground, but the Court said that since fraud was averred it was not necessary that collusion between the employers and the engineer should be alleged, but that the engineer alone was liable on the charge of fraud, and that points out the basis on which this action was brought. This action is not founded on any contract between the contractor and the architect. It is an action brought purely for the wrong done by the architect to the contractor in the discharge by the former of his duties arising out of his employment as architect. His contract binds him to his employer to carry out these duties. His duty to the contractor springs out of his position as architect, and he is liable for dishonestly and fraudulently refusing to carry out those duties. In that view I think this action is founded entirely upon wrong or tort, and this appeal must be dismissed with costs.

HOLROYD, J. I concur entirely with the learned Chief Justice. The case of *Young* v. *Bagge* (*n*) is a clear authority to show that an action of tort will lie under circumstances similar to the present, independently of any contract or supposed contract between the architect and the contractor. The decision in that case proceeded upon the authority of *Pasley* v. *Freeman* (*o*), which is also one of the cases contained in *Smith's Leading Cases* (5th ed.), p. 68, and there commented upon, and that case establishes clearly that where there has been fraud of any kind committed by which another person has sustained damage, an action of tort will lie, and it matters not whether there is any contract out of which a duty arises upon which an action of tort would have lain. It is immaterial whether

(*n*) 4 V.L.R. (L.) 516. (*o*) 3 T.R. 51.

there was any contract or not between these parties. The simple fact that there has been fraud, and damage arising out of that fraud, gives a right of action, and that seems to me to be this case. The pleadings formally state the facts of the case and then go on to allege that the defendant fraudulently withheld his certificate. Now fraud of that kind has been held to be equivalent to any other fraud for the purpose of giving a right of action, and even supposing the plaintiff in this case had another right of action, that would not deprive him of this right of action. But in this case we do not think that the plaintiff had any other right of action upon any other ground. I therefore think that the decision appealed from was right, and this appeal must be dismissed with costs.

HOOD, J. I think it clear that Order LXV., r. 12, only relates to cases of actions between the parties to a contract, and therefore the appellant's case must depend upon the supposition that there is an implied contract between himself and the respondent, but in my opinion no contract can be implied from the relationship between these parties. Where there is no express contract the law will only imply one when it is reasonable to suppose that the parties intended to make an agreement, and, if they had had the opportunity of putting their agreement into writing or words, would have done so. Here, to my mind, it is nonsensical to think that the architect and contractor would have made such a contract as that suggested, which would be equivalent to the contractor saying to the architect: "I will enter into a contract with this employer if you will agree not to be a rogue." I do not think that this is a contract which it would be reasonable to imply, and I agree that the foundation of this action is tort and not contract.

Solicitors for the plaintiff: *Westley & Dale.*
Solicitor for the defendant: *Robb.*

A. F. M.

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June 28.
July 18.

A'Beckett, J.

LANGLEY *v.* LANGLEY.

Husband and wife—Marriage Act 1890 (*No.* 1166), *s.* 98—*Dissolution of marriage—Marriage settlement—Variation of—Power of appointment.*

An order extinguishing the husband's power of appointment, given by marriage settlement to himself and his wife jointly during their joint lives, or to the survivor alone, is an order "with reference to the application of the whole or a portion of the property settled" within the words of sec. 98 of the *Marriage Act* 1890 (No. 1166).

Where by marriage settlement of the wife's property the husband and wife were given a joint power of appointment by deed during their joint lives, and a power of appointment by deed or will was given to the survivor in favour of the children of the marriage, the Court, after a final decree for dissolution of marriage obtained on the petition of the wife, ordered the marriage settlement to be varied so as to give the wife the same power of appointment as if the husband were dead.

PETITION for the variation under sec. 98 of the *Marriage Act* 1890 (No. 1166) of a marriage settlement after a decree absolute for dissolving the marriage had been made.

By a settlement executed on the 12th April 1881, prior to the marriage of Ellen Elizabeth Jane Plummer and Hector McKenzie Langley, property belonging to Miss Plummer was granted, assigned, and confirmed to the Trustees Executors and Agency Company Limited upon trust, to pay forthwith to the said Hector McKenzie Langley 500*l.*, and to convert the residue of such property and invest the proceeds of such conversion, and any moneys so assigned as therein mentioned, and pay the dividends, interest, and income of such investments to the said Ellen Elizabeth Jane Plummer during her life for her sole and separate use, without power of anticipation, and after her death to stand possessed of the securities, dividends, interest, and income, "in trust for all or such one or more exclusively of the other or others of the issue of the said Ellen Elizabeth Jane Plummer born during the lives of the said Hector McKenzie Langley and the said Ellen Elizabeth Jane Plummer or of the survivor of them or within twenty-one years after the death of such survivor at such age or time etc. and upon such conditions with such restrictions and in such manner as the said Ellen Elizabeth Jane Plummer and the said Hector McKenzie Langley shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint and in

default of such appointment and so far as no such appointment shall extend then as the survivor of them shall in like manner or by will or codicil appoint and in default of such appointment or appointments and so far as no such appointment or appointments shall extend in trust for all the children or any the child of the said Ellen Elizabeth Jane Plummer who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares;" and, in default, for the persons entitled under the *Statute of Distributions* had she died possessed thereof, and without having been married.

The marriage was celebrated the same day. On the 12th December 1890 the Court made a decree *nisi* for dissolution of the marriage on the petition of the wife, and on the 23rd March 1891 the decree was made absolute. The only surviving child of the marriage was Neville Langley.

An application was now made by the petitioner on summons that inquiry be made into the existence of any ante-nuptial settlement made on such marriage, and that such order might be made with reference to the application of the whole or a portion of the property settled, either for the benefit of the child of the marriage or of the petitioner, as to the Court might seem fit, and that the costs and expenses of the petitioner in the said suit and of this application be taxed as between solicitor and client, and paid out of the corpus of the said estate.

The existence of the above settlement was established by its production and the affidavit of the petitioner.

Neighbour for the applicant—The application is made under sec. 98 of the *Marriage Act* 1890 (No. 1166) (*a*), and the applicant asks for an order that all power of appointment by the husband respondent may be extinguished, and that she may exercise her power of appointment as if her husband were dead. An order

(*a*) Sec. 98 provides—"The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit . . . ."

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extinguishing a power of appointment in one of the parties to a marriage settlement is an order "with reference to the application of the whole or a portion of the property settled" within the meaning of the section: *Bosvile* v. *Bosvile* (*b*). The applicant also asks that the cost of obtaining the decree for dissolution of marriage and of this application may be paid out of the corpus of the property settled. He referred to *March* v. *March & Palumbo* (*c*) as to costs of the suit.

The husband respondent was served with the summons but did not appear.

McHugh for the only child of the marriage consented to the order asked being made.

Agg for the trustee of the settlement—The trustee raises no objection to the extinguishment of the husband's power of appointment, if the Court should think there is jurisdiction so to order. The power of joint appointment given by the settlement is in terms hardly applicable to a power of appointment. The case of *Bosvile* v. *Bosvile* cited *contra* seems to show that there is jurisdiction to alter the power of appointment, but in earlier times there seems to have been different opinions as to the power: *Seatle* v. *Seatle* (*d*); *Evered* v. *Evered & Graham* (*e*); *Benyon* v. *Benyon* (*f*). It is submitted that the case cited *contra* shows that there is no jurisdiction to order the costs of the divorce suit to be paid out of the corpus of the property settled. Such an order would be to deprive the infant child of the marriage, who, being an only child, has now a vested right to the corpus of the property after his mother's death.

Neighbour in reply.

Cur. adv. vult.

A'BECKETT, J. In this case the wife obtained dissolution of marriage on the ground of her husband's adultery and cruelty. An application has been made to me under sec. 98 of the *Marriage*

(*b*) 13 P.D. 76.
(*c*) L.R. 1 P. & D., p. 445.
(*d*) 30 L.J.P. 216.
(*e*) 43 L.J.P. 86.
(*f*) 1 P.D. 447.

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Act 1890 to vary the settlement executed in consideration of the marriage by making the concurrence of the respondent unnecessary to the execution of the power of appointment given to the wife in favour of her children. The case of *Bosvile* v. *Bosvile* (*g*), to which I have been referred, is an authority for treating such an alteration in the terms of the settlement as "application of property" within the words of the section.

Order that the ante-nuptial settlement, dated the 12th day of April 1881, executed by the petitioner and respondent, be varied by giving to the petitioner the same right of appointment over the property subject to the trusts of the settlement as if the respondent were now dead, and that it be henceforth read and construed, and that the petitioner may exercise such power as if the same were so varied. Order costs of all parties to this application to be paid out of corpus of trust property; costs of trustees as between solicitor and client.

Solicitors for petitioner and for petitioner's child: *Lamrock, Brown & Hall.*

Solicitors for trustees: *Abbott, Eales & Beckett.*

A. J. A.

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Sept. 19, 20, 21, 22

A'Beckett, J.

IN THE ESTATE OF ALFRED STILLINGFLEET WHITE, DECEASED.

Will—Testamentary capacity—Undue influence and mental imbecility—Onus of proof.

Where a will was prepared by a solicitor and his clerk for a man who at the time of giving instructions and at the time of executing it appeared to them perfectly competent to make a will, and on whose evidence in support of the will if standing alone the Court would undoubtedly have acted, but who, other evidence showed, had from long continuous drinking become partly imbecile, and who had been influenced in the making of the will by the executor and sole beneficiary and his wife, the judge refused to admit the document to probate on the ground that the executor had failed to satisfy the onus cast on him of removing from the judge's mind the impression of unfair dealing to be gathered from the whole of the evidence.

MOTION for letters of administration of the estate of Alfred Stillingfleet White, deceased, to his widow Hannah Marion White, notwithstanding his will dated the 9th June 1890.

The materials in support of the application for administration referred to the fact of a will having been executed, and alleged that

(*g*) 13 P.D. 76.

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it had been obtained by fraud and undue influence, and was made at a time when the deceased was not of testamentary capacity. By the will the deceased left all his property to John Thomas Owens, and appointed him executor. A caveat against the application was lodged by the executor, and thereupon an order *nisi* calling on the executor to show cause why administration notwithstanding the will should not be granted to the widow was made. On the return of the order *nisi*, the executor, who had meanwhile advertised his intention to apply for probate, appeared in person, and the learned judge directed both applications to be put into the list and heard together, but the executor took no further steps to prove the will, and the order *nisi* of the widow now alone came on for hearing.

The facts sufficiently appear in the judgment.

Topp and *Agg* in support of the application for administration.

R. H. Cole and *R. W. Smith* for the caveator *contra*.

A'BECKETT, J. During the progress of this case I have had ample opportunity of considering the singular state of facts which the evidence discloses, and I therefore think I should not be in any better position to arrive at a just conclusion by deferring my judgment than I am now. In summing up the evidence, Mr. Topp very candidly stated that there was evidence on which it was competent for me, if my mind were satisfied with that evidence, to form an opinion that this document of the 9th of June 1890, which is propounded for probate, was a will entitled to be admitted to probate, and looking at the evidence in support of the will with reference to the time and the manner in which it was made—looking at that evidence alone—there would be no difficulty in saying that this will would be entitled to be admitted to probate, and at one stage of the case the impression I had formed was that, drunkard as the man was, debased as he had become by his habits, he had not lost the right to dispose of his property. No one would suggest that because a man had formed habits of drinking, and had by reason of his drunken habits formed low associates, he was not perfectly competent to give his property to his friends if he so chose, however low they might be, and however slight their claim on him might be. The judge is not to be influenced by considering

whether the recipient of his bounty was deserving or undeserving. The question is—Was it the man's own act, had he sufficient mind to know what he was doing, or was his mind controlled or affected by the influence of others? As to that, I believe from the facts proved that this man had to a great extent lost his will, and that his intelligence and will had been by drink reduced below their proper natural condition, and were in so low a state that he was easily influenced, and was influenced in procuring the execution of this will. That is the result to which, on the whole of the evidence, I have come.

In coming to that conclusion, I have been affected principally by the clear and undisputed facts in connection with the way in which this man's money, after he had come into possession of a large sum, was dealt with by Mr. and Mrs. Owens. I am not influenced solely by the evidence given of statements made by White that he was in a place in which he did not wish to be, or that he was reduced to such a condition of drunkenness as to have very little will of his own. It is quite clear that he was able for a time to pull himself together sufficiently to enable him to present himself in a state of apparent intelligence, which enabled him to instruct a respectable solicitor to give effect to his acts. In disposing of this case I would like it to be understood that I think that there was nothing in the conduct of any of the solicitors or their clerks in their transactions with him which calls for the slightest unfavourable comment. Their evidence is that, of course, on which the caveator relies, and which, he says, ought to force me to admit this document to probate. Taking that evidence alone, I should have no hesitation in granting probate. But taking the other evidence, I have to start with a man who, according to all the evidence, was reduced to a state of physical degeneration by drink. There is no doubt about that. His health was beyond all question impaired by drink. He was a man well educated, and who had held a position in the army or navy; it is not clear which. He became associated with low people, and went to live with them in a small, uncomfortable house, which is condemned soon afterwards as unfit for human habitation. He was, no doubt, treated by them with some kindness. Then he becomes entitled to receive a considerable sum of money from

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England, and the Owens are perfectly aware that he will receive that money. Then Owens takes him to his solicitor for the purpose of getting a power of attorney in order to get this money out from England. White did so far as that transaction was concerned act as an intelligent man would do. Some time in May 1890 his money, 2,374*l.* 6*s.* 6*d.*, became available, and in considering what was done with that money the undisputed facts tell heavily against the intelligence of White, and tell strongly as to the influence which Owens and Mrs. Owens must have had over him. For what do we find? Accompanied by Owens he, on the 19th of May, gets this large sum of money, for reasons not explained in any way, transferred from the Bank of Australasia to the English, Scottish, and Australian Chartered Bank. In his mode of life, living in the most abject condition, his only need of money appears to have been for drink, and this is what happens. On the day on which the money was paid into the English, Scottish, and Australian Chartered Bank, the 19th May, a sum of 30*l.* is drawn out. The cheque was filled up by Owens. On the day following a sum of 5*l.* is drawn out, and between that and the 31st of May another small sum; and on the 31st the whole of the balance, 2,335*l.* 1*s.* 6d., is drawn. All these cheques are filled up by Owens or his wife. They were in direct communication with White in getting this money, and they admit themselves unable to explain for what this money was wanted, or how it was to be spent, and the account given about the last sum of 2,335*l.* 1*s.* 6*d.* is incredible. Owens pretends, and I think it was a mere pretence, that this money was drawn out because payment of a prior cheque for 2,000*l.* had been refused by the bank. I asked why this man, living in this wretched hole, should want to have cash amounting to 2,000*l.* in the house, and Owens was unable to say at the moment; but, with a cunning which developed itself as the examination proceeded, he said that there had been some talk about buying a house. It was quite plain that he invented a false reason for the drawing of that cheque, if a cheque ever was drawn for that amount, and I may say that as to the evidence of both Mr. and Mrs. Owens, I, sitting as a jury, distrust it altogether. I am sure, so far as I can draw a conclusion, that they have not been candid witnesses, but that they have been cunning and untruthful witnesses, endeavouring to manufacture

evidence, and explain away matters against them. Their account of many of their transactions was in some cases utterly unintelligible, and other transactions they were quite unable to explain at all. Their evidence I discredit altogether. The difficulty, in my mind, is not occasioned by their evidence, but by evidence outside, the truth of which I have no reason to doubt. But taking the undoubted facts, between the 19th and 31st May, all this large sum of money is either unaccounted for, or else is in notes in a box in this man's house. Then Owens is arrested on a criminal charge, and when arrested a bag containing 240 sovereigns is found in a box in his bedroom, and he admits that it was White's money. Being asked how the money came there, he could not explain. He simply said he had changed notes for gold in order that White might not run the risk of losing the notes. Then what was done with the rest of the money? Mrs. Owens gives an extraordinary story of a large sum of money being given into her hands uncounted—1,100*l.*, a sum which exactly fitted the bail which had to be given for her husband's release, and this money goes for that bail. Then came the deed of gift, by which Mrs. Owens gets 2,000*l.* That was made up of another sum of money handed over at the time and this bail money, which was afterwards returned. Not content with that, the bag of sovereigns which belonged to White is taken by her to the bank and paid into her own account, for the purpose of taking care of it, she says. Now what was the meaning of doing that with another person's money? Was it not the strongest admission on her own statement that White was not competent to have the control of the 240*l.*? In the face of that, how can it be said that he was to be trusted to make a gift of 2,000*l.* to Mrs. Owens, and to leave all he had by will to Mr. Owens. Owens, a man of intelligence, must have known that it was a monstrous act to keep so large a sum of money in a box in a house—that it was the act of an imbecile to keep a large sum of money, as White was said to have done, in a chest in a house like that in which he was living. They would also have us believe that White was a sober and intelligent man, and had a will of his own, and yet before any will was made Owens goes to Dr. Eccles and asks him if White can make a will, and when asked for an explanation of this extraordinary proceeding he cannot explain it. Then a

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man who had placed the whole of his property under the control of another, and who is a drunkard, though the Owens would not candidly admit it, but proved to be one indisputably by other evidence, makes this will, and although Owens was not present when it was made, he was waiting for White at the bottom of the stairs. Owens follows and accompanies him whenever any business affecting money is to be transacted, although he had a business of his own to look after. After the will is made he goes up to Dr. Eccles with it, and a conversation takes place, when White says that the will is in accordance with his wishes, and that he intended it to benefit Owens. There is an odd fact in connection with the making of this will to which too much attention should not be paid, with reference to the printed form brought to Mr. Miller when an engrossment had been already prepared and the desire expressed that that printed form should be adopted. That suggests the inference that Owens, fearing that Mr. Miller might make some mistake, wanted this printed form executed. I have omitted to state another fact with reference to the condition of things when the detectives entered this house, which speaks clearly as to the imbecility of White with reference to his money. The detectives found a number of cheques signed by White in the possession of the Owens—some in blank; this the Owens admit; they could not deny it, and did not pretend to explain it. What inference can be drawn from the conduct of a man found in possession of a number of cheques signed in blank by a drunkard in an imbecile state? What are the conclusions to be drawn from all White's money going into the control of Owens or Mrs. Owens? What, except that such person is under their influence, an influence, how much the result of terror and how much the result of other emotions, it would be impossible to define. But I, as a jury would if sitting in my place, have to be satisfied that this document was the product of a mind competent to form and give effect to a wish, and acting free from the influence of another controlling mind. I have no hesitation in saying that this document is of such a character, and the circumstances connected with it lead to such distrust, and point so strongly to both undue influence and imbecility, that I am not so satisfied. It is not, as Mr. Topp stated in his address for the widow, influence alone or

mental imbecility alone, but it is a mixture of both, and nothing but a mixture of both will explain the extraordinary facts and circumstances with which I have had to deal. I have not in this proceeding to determine the validity of the deed of gift. It comes into the present proceedings only as an incident; but very singular and suspicious circumstances arise in connection with it. At one time this deed of gift was drawn up in favour of Owens himself, but White told his solicitor Miller that it did not matter, and that there was no necessity to execute it, as the money had come and was in the Bank of Australasia. It was, in fact, in Owens' house, and therefore Owens did not want the deed of gift, for we can conclude that the money being in Owens' house was pretty nearly as good as in Owens' pocket. I do not think that the caveator has sustained the onus of proof necessary to entitle this document to probate. I am not influenced in my decision in the slightest degree by considering whether the testator's wife had or had not any merits. I have dealt with this case as if the property were to go to distant relatives in England. Neither is my judgment swayed by the fact that the caveator has undergone a sentence for a criminal offence, for I should not assume that because he has committed one kind of offence a different and another kind of offence would be committed by him. But what has governed my decision is an entire distrust of both Mr. and Mrs. Owens, from the manner in which they gave their evidence. Mr. Owens affected not to know whether the man was married or not, and Mrs. Owens affected not to know whether a will was made or not, circumstances which any person of common sense would say at once must have been clearly present to their minds though they pretended to be ignorant of them. Then Mrs. Owens gave a false statement to the registrar. The whole of their evidence is permeated by falsehood, and the evidence apart from theirs is insufficient to dispel the strong impression of unfair dealing with this man. I therefore give judgment for the plaintiff administratrix, and make the rule absolute, with costs against the caveator.

Solicitor for applicant: *C. Marriott Watson.*
Solicitor for caveator: *Morgan.*

A. J. A.

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Oct. 3, 4, 11.

A'Beckett, J.

IN RE THE MAITLAND COAL MINING COMPANY LIMITED.

Companies Act 1890 (*No.* 1074), *ss.* 78, 114, 133-136, *and Schedule* 7, *rule* 3—*Voluntary winding up of company—Petition for winding up under supervision By whom petition may be presented—Voluntary liquidator—Petition of company.*

Quære, whether the liquidator in a voluntary winding up of a limited company under the *Companies Act* 1890 (No. 1074) can present a petition for the continuation of the winding up under the supervision of the Court.

Where the liquidator did present such a petition, the Court, being satisfied that the petition was really that of the company, granted the order on the petition being amended by adding the company's name, and the seal of the company affixed to the petition.

PETITION by John Lynne Wharton, the liquidator of The Maitland Coal Mining Company Limited, which was being wound up voluntarily, for an order continuing the voluntary winding up of the company, subject to the supervision of the Court.

The Maitland Coal Mining Company Limited was registered on the 18th of July 1890 under "*The Companies Statute* 1864" as a limited company, having its registered office in Melbourne, and formed for the purpose of purchasing certain land and colliery works, and mining for coal, fire-clay, and other similar materials in New South Wales. The company had since carried on its mining operations at Maitland, New South Wales, and had carried on its business at its registered office in Melbourne and its place of business in Newcastle, New South Wales. In the course of its business the company incurred debts in New South Wales and in Victoria, and was unable to pay the same. Under these circumstances the company, at an extraordinary general meeting on the 16th May 1892, passed an extraordinary resolution that it had been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it was desirable to wind up the same, and accordingly that the company be wound up voluntarily, and at the meeting H. A. D. Sheppard was duly appointed liquidator for the purposes of the said winding up. Mr. Sheppard had since published the usual notices calling for all claims against the company, and had settled and signed the list of contributories, and had made one call of 6*d.* per share on the capital of the company, which was 80,000*l.* in 80,000 shares of 1*l.* each.

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In re THE MAITLAND COAL MINING CO. LIMITED.

A'Beckett, J.

The Railways Commissioners of New South Wales claimed to be creditors of the company for 222*l.* 1*s.* 6*d.*, and on the 8th August 1892 presented their petition to the Supreme Court of New South Wales, praying for an order to wind up the company. The said liquidator opposed the petition, and on the 6th September 1892 it was ordered to stand over until the 4th October 1892, upon the liquidator through his counsel undertaking to apply to the Supreme Court of Victoria for an order to continue the winding up of the company under the supervision of the Court. On the 6th September 1892 H. A. D. Sheppard resigned the liquidatorship, and the petitioner John Lynne Wharton was duly appointed in his stead.

There were twenty-six creditors of the company resident in New South Wales, whose claims amounted to 3,797*l.* 2*s.* 5*d.*, and nine creditors in Victoria, whose debts amounted to 54,356*l.* 7*s.*, including 45,099*l.* 11*s.* 2d. due to the Commercial Bank.

The present liquidator, J. L. Wharton, presented the petition for an order continuing the winding up of the company subject to the supervision of the Court, and it was accepted by Hood, J. The petition now came on for hearing.

The verified consent to the application of the Commercial Bank, A. W. Collier & Co., C. B. Norton, and the petitioner, all of Melbourne, who were creditors of the company, was filed. Their claims amounted to 44,669*l.* 7*s.* 4d.; the total amount of the debts in Victoria being 54,356*l.* 7*s.*, and in New South Wales 3,797*l.* 2*s.* 5*d.* The affidavits stated that the Railways Commissioners of New South Wales consented to the application, but no consent was filed.

Agg in support of the petition.

[A'BECKETT, J. Is there any authority for a voluntary liquidator presenting a petition for a continuing of a voluntary winding up under supervision?]

So far as I have been able to find, there is no express authority either way; but there are two cases bearing on the matter, one against me and one in my favour. The petition is under Part I. of the *Companies Act* 1890 (No. 1074), division 4 of which relates to the "Winding up of companies." Sec. 78, which comes next

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after the sections relating to compulsory winding up, and comes under the subdivision "Winding up by court," provides that any application to the Court for the winding up of a company under Part I. of the Act shall be by petition presented either by the company or by one or more creditor or creditors, contributory or contributories, or by all or any of them together or separately. Apart from decision, I should submit that that applied only to compulsory winding-up orders; that an order for supervision is not a winding up within the meaning of the section. Sec. 114 commences a new subdivision, entitled "Voluntary winding up of companies," and under it comes sec. 124, which provides that in a voluntary winding up the liquidator may apply to the Court to determine any question arising in the matter of such winding up. Then sec. 133, under the same subdivision, provides that the Court may make an order directing that the voluntary winding up should continue, but subject to the supervision of the Court, and with liberty for "creditors, contributories, *or others*," to apply to the Court. Then sec. 134, also under the same subdivision, provides that a petition praying that a voluntary winding up shall continue, subject to the supervision of the Court, shall, "for the purpose of giving jurisdiction to the Court over suits and actions," be deemed to be a petition for winding up the company by the Court, which it is submitted shows that for other purposes it is not, and that therefore it is not a petition for an order for winding up the company within the meaning of sec. 78. Sec. 135 provides that the Court may have regard to the wishes of creditors and contributories in determining whether a company is to be wound up by the Court, or subject to the supervision of the Court, which bears out the same view, and sec. 136 provides for the appointment of an additional liquidator, treating the voluntary liquidator as continuing *nolens volens*. The 7th schedule of the Act, r. 3, provides that every petition for the winding up of a company subject to the supervision of the Court shall be served (among others) on the liquidator appointed for the purpose of winding up the affairs of the company. The rule and sections in England corresponding with that rule and all those sections have been dealt with by the Court of Chancery in *Re Pen-y-Van Colliery Company* (*a*), where Jessel, M.R., held

(*a*) 6 Ch. D. 477.

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generally that an order continuing the voluntary winding up of a company under the supervision of the Court could only be obtained on a petition by the company, a creditor, or a contributory, treating it as covered by the words in sec. 78, but in that case the petition was by a person treated for the purpose of the decision as a stranger, and the Master of the Rolls undoubtedly thought that the words "or others" in sec. 133 referred to a voluntary liquidator. It is at least doubtful whether, if the petitioner had been the voluntary liquidator, the Master of the Rolls would not have held him to have sufficient *locus standi* to present the petition. The other case was six years later, but that case was not cited in it. It is *Re Zoedone Company Limited* (*b*). In that case there was a clear decision that the voluntary liquidator may petition; but in that case, although the fact is not referred to in the judgment or argument, the liquidator was also a shareholder in the company. Here the petitioner is also a creditor, though the petition is not presented in that capacity. It is submitted that there is no limit by sec. 133 to those who may petition for a supervision order as there is by sec. 78 in the case of other petitions for winding up; that it is in this case for the benefit of creditors and contributories alike that the application should be granted in order to avoid a double liquidation—a compulsory one in New South Wales, and a voluntary one in Victoria.

Cur. adv. vult.

Oct. 11.

A'BECKETT, J. This is a petition by the voluntary liquidator of the Maitland Coal Company Limited for an order to continue the voluntary winding up under the supervision of the Court. I am satisfied that the company is really the petitioner, and I think I may make the order on the petition being amended by adding the company's name, and on its being sealed with the seal of the company. I do this because I think that the company is practically the petitioner.

Solicitor: *C. M. Watson.*

A. J. A.

(*b*) 53 L.J. Ch. 465; 32 W.R. 312.

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Oct. 6.
A'Beckett, J.

IN THE ESTATE OF CHARLES HETHERINGTON, DECEASED.

Practice Probate—Probate Act 1892 (*No.* 1261)—*Jurisdiction of Court to grant probate—No application to Registrar.*

Although the Court still has jurisdiction to grant administration of an intestate's estate where no application has been made to the Registrar of Probates for that purpose, it will decline to do so, inasmuch as otherwise the object of the Act might be defeated and the imposition of the 2*l.* fee on application to the Registrar avoided, nor will it accept as a reason for applying direct to the Court the necessity of having to come to the Court on an application to dispense with sureties to the administration bond after the Registrar has granted administration, and the obvious saving of expense to the estate.

MOTION for letters of administration of the estate of Charles Hetherington, deceased, and for an order dispensing with the sureties to the administration bond.

Woolf in support—The application for administration might under the new Act of 1892 (No. 1261) be made to the Registrar, but it is submitted that the jurisdiction of the Court has not been taken away. The Registrar has no jurisdiction to dispense with sureties, the estate being over 500*l.*, and it would be necessary in any event to make application for that purpose to the Court. It is submitted that in such a case it is reasonable to make both applications at once to the Court. By so doing there is an actual saving of expense, for counsel's fee is the same, and the fee of 2*l.* required by the Act on application to the Registrar is saved.

A'BECKETT, J. In this case no application having been made to the Registrar of Probates, an application is made to me in open Court to grant administration which the Registrar has now power to grant, and it is not suggested that he might not have granted it. It is said that the jurisdiction of the Court has not been taken away, and that, no doubt, is so, but the object of the Act would be altogether defeated, and payment of fee of 2*l.* might be avoided in all cases in which the parties chose to apply in open Court. They might say, "We will choose to apply in open Court. The Court has jurisdiction and we prefer paying the fee to counsel for applying in open Court to paying a fee to the Government." I do not suggest that this has been the intention of the parties

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here. It may be in this particular case that application to this Court might become necessary, but I do not think I should accept that as a reason for assuming jurisdiction to grant administration in a case in which administration, so far as appears, can and will be granted by the Registrar. I therefore decline to grant the application now made for administration of this estate, and the matter which has been mentioned as a reason for making application in open Court—the application to dispense with sureties—is one which should follow the grant of administration. I decline to deal with it at present.

Solicitors: *Briggs & Snowball.*

A. J. A.

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Oct. 12.

Transfer of Land Act 1890 (*No.* 1149), *ss.* 124, 125, 131—*Discharge of mortgage, registration of—Consent of mortgagee to sue.*

A mortgagor of land under the *Transfer of Land Act* 1890 (No. 1149) who has paid off the money due under the mortgage and who has lodged the discharge for registration but has not obtained registration thereof, is bound by sec. 125 of the Act No. 1149 to obtain the written consent of the mortgagee before he can commence an action in his own name in respect of which the mortgagee might have sued.

SPECIAL CASE reserved for the opinion of the Full Court by the judge of the County Court at Melbourne.

The action was brought by the plaintiff for the sum of 13*l.* 12*s.* 6*d.* for the use and occupation of certain premises. The defendants, by their defence, raised the objection that the plaintiff had not obtained the written consent of the mortgagee to bring this action. The following evidence was given:—The certificate of title, mortgage by plaintiff, discharge of mortgage, and some other documentary evidence not material to this report were put in. It was admitted that the defendants were in possession of the premises, and had previously paid rent, but not for the period of time now sued for. The discharge of the mortgage had been lodged for registration, but had not been registered before the commencement of this action, and it was admitted that the plaintiff had not obtained the consent in writing of the mortgagee before commencing the action. The case was tried in the County Court at Melbourne, before His

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Honor Judge Casey, who reserved the following question for the opinion of the Full Court:—"The mortgagee having been paid off and the discharge of the mortgage having been lodged for registration, but not registered before the commencement of this action, was the plaintiff under the circumstances hereinbefore set out, and having regard to secs. 124 and 125 of the *Transfer of Land Act* 1890, entitled to commence this action in her own name without the previous consent in writing of the mortgagee?"

Pigott for the plaintiff—As soon as the mortgage was paid off the mortgagee had no rights thereunder. Sec. 124 of the *Transfer of Land Act* 1890 was intended to protect the mortgagee, and a stranger could have no greater rights than the mortgagee (*a*). No doubt under sec. 125 a mortgagor cannot sue without the written consent of the mortgagee. There must, however, be an actual mortgage in existence, and if the moneys have been paid off, the relation of mortgagor and mortgagee ceases, and sec. 125 would not apply to such a case. Under the provisions of sec. 131 the mortgage must be taken to have been discharged.

Fink, for the defendant, was not called upon.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., WILLIAMS and HODGES, JJ.]. The answer

(*a*) "Sec. 124. In addition to and concurrently with the rights and powers conferred on a first mortgagee and on a transferree of a first mortgage by this Act every present and future first mortgagee for the time being of land under this Act and every transferree of a first mortgage for the time being upon any such land shall until a discharge from the whole of the money secured or until a transfer upon a sale or an order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee or transferree after an order for foreclosure shall have been entered in the register book; or shall, until the entry of such an order, render a first mortgagee of land leased under this Act or the transferree of his mortgage liable to or for the payment of the rent reserved by the lease or the performance or observance of the covenants expressed or to be implied therein."

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to the question presented to us on this special case must be determined by the terms of sec. 124 of the *Transfer of Land Act* 1890 (His Honor read the section). Those provisions show that the *registration* of the discharge is essential to the validity and effect of the discharge. This discharge was not lodged for registration until the 17th March 1892, and was not registered at the time when this action was commenced. We are of opinion that the mortgagor had not a right to commence this action in her own name without the previous consent in writing of the mortgagee.

Question answered in the negative.

Solicitor for plaintiff: *Hopkins.*
Solicitor for defendant: *Peers.*

W. H. M.

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Nov. 3.
Hodges, J.

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED *v.* DIMOCK.

Will construction—Annuity—Setting apart fund to provide annuity—Insufficiency of fund—Annuity payable out of corpus.

Where a testator directs a sufficient sum to be set apart in order to produce an annuity of a specific amount, which on the death of the annuitant is to fall into the residuary estate, the annuitant will be entitled to be paid out of the corpus of the fund set apart if he does not leave sufficient assets to produce income sufficient to meet the annuity; but where the fund set apart to provide the annuity is given, on the death of the annuitant, over, and does not fall into the residue, the annuitant is entitled only to the income that that fund produces.

ORIGINATING SUMMONS referred to Court to determine questions arising in the execution of the trusts of the will of Dr. Dimock, deceased.

By his will, the testator, after making certain specific bequests, gave, devised, and bequeathed all the rest of his property to The Trustees Executors and Agency Company Limited in trust, to permit his brother Frederick Dimock and his wife (in the will called Harriet Wymark) to reside in his dwelling-house in Dawson Street, Ballarat, as occupied by him during their joint lives and the life of the survivor, or should they elect to reside elsewhere, then he directed his trustee to let the dwelling-house and to pay the

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rent arising therefrom to his said brother and his said wife during their joint lives, and during the life of the survivor, and upon further trust to pay to his said brother and his wife, during their joint lives, and the life of the survivor, a yearly sum of 200*l.*, by equal payments, the first of such payments to be made one month after his death, and he directed that his trustee should also set apart sufficient of his trust funds to pay to his god-daughter, Emily Searley Long, then in England, a yearly sum of 70*l.*, to be paid to Mrs. Emma Long, of Stanley Villa, Cosham, Hants, in England, for the benefit of the said Emily Searley Long, and on the death of the said Emma Long, he declared that the receipt of the said Emily Searley Long should be a sufficient discharge to his trustee. And he declared that, during the lives of his brother Frederick and his wife, and the life of the survivor, all unapplied income should be accumulated for the benefit of his residuary legatees, and on their death the said sum of 200*l.* payable to them, and the fund from which it should arise, should also sink into his residuary estate; and as to the sum set apart for the benefit of his god-daughter, Emily Searley Long, he directed that on her death it should be equally divided amongst the children of his two nieces, Amy Kranze and Kate Morgan, as and when they should respectively attain the age of twenty-one years, and during their minority he directed that the interest should be applied for their benefit as his trustee should consider most advantageous, and on the death of his brother and the said Harriet Wymark, he declared that his trustee should stand possessed of the whole of the residue of his trust fund and all accumulations in trust for his said two nieces, Amy Kranze and Kate Morgan, in equal shares for their own use and benefit, free from the control of their present husbands.

Probate was granted on 13th April 1891, and the amount of the estate on realisation only amounted to 1,500*l.*, a sum insufficient to provide for the annuities of 200*l.* and 70*l.*, and the present summons was taken out by the trustees and executors against the testator's brother, Frederick Dimock, and his brother's wife, his nieces, Amy Kranze and Kate Morgan, and the children of his nieces, to have the following questions determined:—

(1) Whether, owing to the residue of the estate of the said stator being insufficient to provide for the payment of the

annuities of 200*l.* and 70*l.*, and owing to the express provision of the will for setting apart a fund to provide for the annuity of 200*l.*, any and what sum should be set apart by the plaintiffs for payment of such annuity of 200*l.*, or some and what proportion thereof, or how otherwise should the payment of such annuity of 200*l.* be provided for?

(2) Whether, under the circumstances, the plaintiff company should, in accordance with the directions in the will, set apart a fund sufficient to provide for the payment of the annuity of 70*l.* bequeathed to the defendant, Emily Searley Long, or whether some smaller and what fund should be set apart by the plaintiff?

(3) Whether the defendants Frederick Dimock and his wife are, as against the defendants Amy Kranze and Kate Morgan, the residuary legatees under the said will, entitled to be paid out of the corpus of the residuary estate or some part thereof such sum as may be necessary to make the income of any proportionate part of the residuary estate, which may be set apart to meet their said annuity, amount in each year to 200*l.*?

(4) Whether, in the event of a fund being set apart which is not sufficient by its income to provide for the payment of the full amount of the said annuity of 70*l.* bequeathed to the defendant Emily Searley Long, the said defendant is entitled to receive out of the corpus of such fund the amount necessary to make up the full yearly sum of 70*l.*?

Goldsmith for the defendant Emily Searley Long—A material question which has not been asked is whether the specific legacies do not also abate.

[HODGES, J. I cannot deal with any question that is not asked.]

Wasley for the plaintiff company.

Weigall for all the defendants except Emily Searley Long—All the defendants for whom I appear, though they might have different interests, are agreed that each of the two annuities should abate proportionately. The will as to the 200*l.* annuity amounts not only to a direction to set apart a specific sum to provide for

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that annuity, for it speaks of the fund from which it should arise, but to a direction to pay the persons entitled to that annuity the sum of 200*l.* a year. The annuity of 70*l.* is so far in the same position; but as to the annuity of 200*l.* the fund from which it arises is to go into the testator's residuary estate, while the sum set apart for the 70*l.* annuity is given over to the children of his nieces. Under these circumstances it is submitted that the persons entitled to the 200*l.* annuity are entitled to so much of the *corpus* of the fund set apart as is sufficient to make up the yearly sum of 200*l.*; while as to the 70*l.* annuity, the person entitled to it is only entitled to the income of the fund set apart to produce it: *Croly* v. *Weld* (*a*).

[HODGES, J. That case seems to apply to both annuities.]

The authorities are collected in the notes to *Ashburner* v. *Macguire* (*b*), including *Mason* v. *Robinson* (*c*) and *Gee* v. *Mahood* (*d*).

Goldsmith—It is in each case a question of the testator's intention: *Beeston* v. *Booth* (*e*).

HODGES, J. In my opinion the first question must be answered in this form. Assuming that the funds are not sufficient, or the residuary estate is not sufficient, to enable the trustees to set apart sufficient to pay 200*l.* a year and 70*l.* a year, they must divide that portion of the estate into two parts, bearing each the same relation to the other that 200*l.* bears to 70*l.* That is the mode by which payment of those annuities should be provided. That answers really the first and second questions. If they cannot set aside sufficient, they should set aside as much as they can. As to the third question, it must be answered, in my opinion, in this way: that the trustees are to pay income as far as it will go, and if the income is not sufficient, the trustees should pay so much of the *corpus* of the fund set apart as is sufficient to make up the 200*l.* a year to Frederick Dimock and Harriet. I think the case of *Croly* v. *Weld*, to which I have been referred, clearly shows that those two

(*a*) 3 De G. M. & G. 995.
(*b*) 2 Wh. & Tud. L.C. in Eq. (6th ed.), pp. 268-9.
(*c*) 8 Ch. D. 411.
(*d*) 11 Ch. D. 891.
(*e*) 4 Mad. 161.

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persons are entitled to have 200*l.* a year, and the persons entitled in remainder must suffer. I think also that that case shows how the fourth question must be answered, that in the case of Emily Searley Long she can only receive the income of the fund set apart, and cannot touch the *corpus*. The trustees can pay her the whole of the income of the fund, but not the *corpus*. Costs of all parties out of the estate; those of the trustees between solicitor and client. Liberty to apply.

Solicitors for plaintiff: *Cuthbert, Hamilton & Co.* for *Cuthbert, Wynne & Co.*, Ballarat.

Solicitors for all defendants except defendant Long: *Malleson, England & Stewart.*

Solicitor for defendant Long: *Morgan.*

A. J. A.

CHRISTIE *v.* WHITTLES.

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Nov. 3, 4, 18.

Hodges, J.

Vendor and purchaser—Sale of land—Error in acreage—Completed contract—Mutual mistake—Rescission of contract—Compensation.

An agreement for the purchase and sale of two blocks of land was entered into for 1,500*l.*, and not at so much per acre; but at the time of entering into this agreement both vendor and purchaser believed the blocks contained one hundred and twenty-six acres, whereas they only contained a little over one hundred and twenty acres. A contract of sale was drawn up by the plaintiff's solicitor stating the correct acreage, and the solicitor struck out the usual compensation clause from the form of contract used because the contract was a lump sum contract. This contract so prepared was executed, the land conveyed, all the purchase money paid, and the purchaser let into possession. Some time after the purchaser brought an action for rescission of the contract and a return of the purchase money, or for compensation for the short acreage. There was no misrepresentation as to the acreage.

Held, that he was not entitled either to rescission or to compensation.

Semble, if the vendor, honestly believing that there were one hundred and twenty-six acres, had so stated to the purchaser, and they had both entered into the contract under that impression, the purchaser, after the contract had been executed, the purchase money paid, the land conveyed and possession taken, could not have obtained any relief.

ACTION for rescission of a contract for the sale of land and return of the purchase money or for damages by way of compensation for short acreage.

The facts and arguments sufficiently appear from the judgment.

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Higgins for the plaintiff cited *Kerr on Fraud* (2nd ed.), 393 and 544; and *Dyer* v. *Hargrave* (*a*).

Cussen for the defendant cited *Okill* v. *Whittaker* (*b*); 2 *Dart's Vendors and Purchasers* (6th ed.), 837; *Besley* v. *Besley* (*c*); *Allen* v. *Richardson* (*d*); *Palmer* v. *Johnson* (*e*); *Clayton* v. *Leech* (*f*); *Paget* v. *Marshall* (*g*); *Guest* v. *Watson* (*h*); *Pollock on Contracts* (5th ed.), 459; and *Tamplin* v. *James* (*i*).

Cur. adv. vult.

Nov. 18.

HODGES, J. About August 1889 the plaintiff's father, the real plaintiff in this action, was negotiating with the defendant with the view of purchasing from her two pieces of land, namely, Crown allotment 6, section A, parish of Tanjil, county of Tanjil, and a piece of land, containing about thirty acres, immediately adjoining the first-mentioned piece originally selected by the defendant's husband, now deceased. He had offered the defendant 14*l.* per acre for this land, and she had accepted the offer, and had received from the plaintiff a small deposit. The plaintiff's father, being dissatisfied with the purchase, allowed the small deposit to be forfeited, and the sale went off. During these negotiations the plaintiff's father was under the belief that Crown allotment 6 contained ninety-six acres. It is by no means clear how he arrived at the acreage, but I conclude, after having heard the witnesses and examined the documents, that this belief was occasioned by his having seen a circular from the Department of Lands and Agriculture, dated 31st May 1878, which refers to the block as containing ninety-six acres. The plaintiff's father remained in this belief up to the time of the making of the verbal contract to which I shall presently refer. I think the defendant's belief was the same. The first sale having gone off, the plaintiff and his father in September 1889 again approached the defendant,

(*a*) 10 Ves. 505.
(*b*) 1 De G. & S. 83.
(*c*) 9 Ch. D. 103.
(*d*) 13 Ch. D. 524.
(*e*) 13 Q.B.D. 351.
(*f*) 41 Ch. D. 103.
(*g*) 28 Ch. D. 255.
(*h*) 17 V.L.R. 497.
(*i*) 15 Ch. D. 215.

and an offer of 12*l.* an acre was made, which the defendant expressed her willingness to accept. The plaintiff's father, assuming that the two blocks contained one hundred and twenty-six acres, calculated that the purchase money on this basis would amount to 1,512*l.*, and then offered the defendant 1,500*l.* for the two pieces of land, 800*l.* cash and 700*l.* in twelve months without interest. And I find, as a fact, that the offer of the plaintiff and his father was a bulk sum of 1,500*l.* for the two pieces of land, and that that was the verbal offer which the defendant verbally accepted. But while such was the verbal contract, I arrive at the conclusion that the three persons believed that the two pieces of land contained one hundred and twenty-six acres, and that probably the one document was responsible for the belief which these people entertained. These people on that day, or the next, went to Mr. Briggs, who was solicitor for the plaintiff and his father in this transaction, and the plaintiff's father instructed Mr. Briggs to prepare a contract, and told the solicitor that the two pieces of land had been purchased for 1,500*l.*, 800*l.* to be paid in cash and 700*l.* in twelve months without interest. Mr. Briggs accordingly prepared a contract, but before drawing up the contract ascertained the correct acreage of the two blocks, and found out that Crown allotment 6 contained only ninety acres twenty-nine perches, and did not contain ninety-six acres, and inserted in the contract he so prepared the number of acres that this block actually contained. This contract was signed by the plaintiff and defendant about the 19th of September 1889, and the 800*l.* was at this time paid. Mr. Briggs says that he explained the contract to the plaintiff and his father, who found the money, but believes he did not mention the acreage, and I am inclined to think he is so far accurate in his recollection. In November 1889 the plaintiff went into possession of the land, and has remained in possession ever since. About September 1890 the plaintiff's father and the defendant met at Mr. Briggs' office for a final settlement of the matter. The plaintiff's father paid the balance of 700*l.*, and the defendant signed a transfer which the plaintiff has also executed. There is conflicting evidence as to what took place at this meeting, and also as to what took place the day before between the defendant and Mr. Briggs. My conviction is that at the settling up the defendant

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wanted 12*l.* more, as one hundred and twenty-six acres at 12*l.* an acre amounted to 1,512*l.*, and that she was told by Briggs that the contract was a bulk sum contract, that acreage had nothing to do with the matter, and if acreage had anything to do with it she was getting 60*l.* too much; that she yielded to the view so expressed by Mr. Briggs, and signed the transfer and took the money, and that the plaintiff's father heard what took place, and, hearing what took place, paid the 700*l.*, and took the transfer. He probably did not fully appreciate the effect of what took place, but I feel no doubt that he heard what Mr. Briggs said. On these facts the plaintiff claims 72*l.* for the six acres short, or rescission of the contract.

The only propositions of fact necessary for the foundation of my judgment are that the verbal agreement of sale was not so much per acre, but an agreement to sell the two pieces of land for 1,500*l.*; that the plaintiff's solicitor drew up the contract, and struck the compensation clause out of the form which he used in drafting the contract, because it was a lump sum contract; and, further, that the plaintiff's solicitor put the correct acreage in the contract; that both plaintiff and defendant at this time believed that the two blocks contained one hundred and twenty-six acres, whereas, in fact, they contained only one hundred and twenty acres; that this contract has been executed, the land conveyed and the money paid, and the plaintiff put in possession since November 1889.

Mr. Higgins urges on behalf of the plaintiff that this is a case of mutual mistake, and that the plaintiff is entitled to have the contract rescinded, that that is the plaintiff's right, and that that is what the plaintiff claims, though he is willing to allow the contract to stand if he gets the 72*l.* for the six acres short. That proposition of law amounts to this—that a purchaser is entitled to have an executed contract of sale rescinded because the subject matter of sale is not all the vendor and purchaser believed it to be. This sounds somewhat startling. A horse is sold by written contract for, say, 50*l.*, the written contract containing no reference to size, soundness, or age. If the purchaser fixed the price at 50*l.*, from a belief in the horse's size, soundness, or age, it could not, I think, be contended that he could rescind the contract and recover back his money on proof that both he and the vendor believed that the

horse was seventeen hands high whereas he was only sixteen hands high, and that the price was fixed after taking this element into consideration; nor could he, in my opinion, claim any compensation. Similarly as to soundness or age. To my mind the answer to any attempt to do so would be, the purchaser has got what he contracted to buy, and he substantiates no claim against the vendor because the horse is not all that he and the vendor believed it to be. If he desires to be put in a position to make any claim in respect of these matters, they should be inserted in the contract. How stand the authorities? It is to be noted that no fraudulent misrepresentation is alleged in the pleadings, nor is any such proved. Further, no misrepresentation is alleged in the pleadings, and, if it had been, although on this there would have been some evidence, I should have found against the plaintiff. The allegation only is one of common mistake. Now the position of the defendant, on account of the common mistake which has existed, apart from any misrepresentation by her, cannot be worse, because she has made no misrepresentation. Further, the defendant's position cannot, I conceive, be worse, because the plaintiff's solicitor knew the correct acreage, and inserted it in the contract which he drew up on the plaintiff's instructions. And, in my opinion, if the defendant, honestly believing that there were one hundred and twenty-six acres in these blocks, had so represented, and plaintiff and defendant entered into this contract under that impression, the plaintiff after the contract had been executed, purchase money paid, land conveyed, and possession taken, could not have obtained any relief. In *Legge* v. *Croker* (*k*) the defendant leased to the plaintiff his house and premises. In the course of the negotiation the plaintiff asked the defendant if there was any public right of way over a certain portion of the ground. The defendant said there was not. The heads of the agreement were reduced to writing, and contained this statement as to there being no right of way. The writing was not signed. Leases were afterwards executed by plaintiff and defendant, and the plaintiff took possession. The statement that there was no public right of way was a mistake. There was a public right of way over the part that had been referred to. The statement that there was not had been honestly but

(*k*) 1 B. & B. 506.

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mistakenly made. The Lord Chancellor in delivering judgment said (page 514) :—

"Then arises the question whether under the head of fraud or mistake the defendant is bound to make good the injury the plaintiff has sustained by reason of the right of way being established; and if he is, whether that is to be done by altogether rescinding the contract and cancelling the leases or by making compensation by way of damages?

"If it were a wilful misrepresentation the plaintiff might be entitled to relief; but where the parties have expressed their meaning by a lease that has been with due deliberation executed, and where there is no wilful misrepresentation nor any mistake in omitting to introduce a covenant respecting this right of way into the deed, it would be very dangerous to correct this deed upon such slight grounds . . . . . The case appears to me to bear some resemblance to the sale of a horse where the vendor says he believes the horse to be sound but will not warrant him; now, to make him liable the purchaser must prove the *scienter* which is the gist of the action that at the time he asserted he was sound he knew him to be unsound . . . . . The case would have been materially different if wilful misrepresentation or omission had been made out; it is sufficient for me to say they form no part of the case before the Court.

"I am therefore of opinion that the leases being deliberately executed in which this stipulation was not introduced or intended so to have been, the parties must be bound by the contract."

Accordingly he holds that the lessee is bound by the contract and can get no relief by way of rescission or by way of compensation. And in *Wild* v. *Gibson* (*l*) Lord Campbell says :—

"I must say that in the Court below the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that has been executed has not been very distinctly borne in mind. With regard to the first, if there be in any way whatever misrepresentation or concealment which is material to the purchaser, a Court of Equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my lords, that a Court of Equity will set aside the conveyance only on the ground of actual fraud."

In *Brownlie* v. *Campbell* (*m*) Lord Selborne says :—

"Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, as far as I know, in either country" (he is speaking of England and Scotland) "the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived."

Then further on, with reference to the case of *Legge* v. *Croker* he says :—

"During the course of the argument I called the attention of the learned counsel for the appellant to what was said in the judgment given in this House by Lord Cottenham in the well-known case of *Wilde* v. *Gibson*, and more particularly to the

(*l*) 1 H. L. Cas., at p. 632. (*m*) 5 App. Cas. p. 937.

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case of *Legge* v. *Croker* there referred to, apparently with approbation, which was before Lord Manners in Ireland, and which had in some respects a close resemblance to this case. There a positive statement was made that there had been a decision against a right of way. It was *bonâ fide* believed that there had been such a decision, but when it was examined it was found not to exclude every sort of right of way, but only a certain kind; and one other kind, not excluded by it, remained, and was eventually established. That representation having been believed to be true at the time it was made, and having been made in good faith, it was held, after conveyance, by the Court, that it was no ground for relief in equity, either by way of compensation or by setting aside the contract."

The principles enunciated in those cases in my opinion govern this case, and as this is a completed transaction, and as there is no fraud, the plaintiff is not entitled to any redress by reason of the erroneous belief both he and the defendant entertained as to the number of acres in the blocks purchased. There are other reasons for which I would be prepared to decide for the defendant, but I prefer to found my judgment on that reason. Judgment for the defendant with costs.

Solicitors for plaintiff: *Briggs & Snowball.*

Solicitors for defendant: *Crisp & Cameron*, for *Gray*, Traralgon.

A. J. A.

IN THE WILL OF THOMAS WALSH, DECEASED.

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Nov. 2, 3, 4, 7, 8, 10, 11, 23.

A'Beckett, J.

Will—Testamentary capacity—Undue influence—Beneficiary preparing will—Onus of proof—Degree of soundness of mind.

The fact that a person who prepared a will, under which he takes a benefit, was not seeking to benefit himself personally so much as his Church, does not relieve him from the obligation cast upon him on propounding the will of satisfying the Court that no undue influence was used to procure the will.

The highest degree of soundness of mind is required in order to constitute capacity to make a testamentary disposition of property, inasmuch as a testator must be able to reflect upon the claims of the several persons who by nature or through other circumstances may be supposed to have claims on his bounty, and of properly considering them, and to determine in what proportions his property shall be divided amongst the claimants.

MOTION for the administration *cum testamento annexo* of the estate of Thomas Walsh, deceased, to the Reverend Peter Kernan, Roman Catholic priest in charge of St. Joseph's Church, Collingwood, the executors appointed by the will, D. V. Hennessy and T. Sabelberg, the sons-in-law of the deceased, having renounced probate.

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A caveat against the application was lodged by the executors, Hennessy and Sabelberg, on the ground that the testator, when he executed the will, was not of testamentary capacity; and on the ground that the execution of the will was procured by the undue influence of the applicant, Father Kernan.

The facts sufficiently appear in the judgment.

Purves, Q.C., *Duffy*, and *Coldham* for the applicant.

Madden and *Topp* for the caveators.

Cur. adv. vult.

Nov. 23.

A'BECKETT, J. I have to determine the validity of a will signed by one Thomas Walsh the day before his death. It was written for him by the Rev. Peter Kernan, a priest of the Roman Catholic Church, spoken of in evidence as Father Kernan. This will is opposed on the ground of the testator's incapacity and of undue influence by Father Kernan. The testator was seventy-eight years of age, and first consulted his doctor, as to the disease from which he died, on the 8th of July. On the morning of Sunday, the 17th of July, he was found lying in a fit by the side of the bed at which he had been praying. He was helped into bed, and never left it again except for a few minutes. The important incidents in the case occurred after that Sunday. The testator was worth about 19,000*l.* By the will 500*l.* is given to his housekeeper, and 500*l.* to a son James. The rest of the property is divided into eight shares. One is given to the children of his daughter, Mrs. Sabelberg; one to the children of his deceased daughter, Mrs. Hennessy; one to the children of his deceased son, Patrick; one to the reverend mother of the Little Sisters of the Poor; one to the reverend mother of the St. Vincent de Paul's Convent; one to the reverend mother of the convent at Abbotsford; one to His Grace the Roman Catholic Archbishop; and one to "the Reverend Peter Kernan or the pastor in charge of the R.C. Church, Otter Street, Collingwood." The communications between the testator and Father Kernan as to the making of the will were mixed up with dealings as to deposit receipts for 1,000*l.*, and to cheques for sums amounting to 1,000*l.* given by the testator to Father Kernan to be distributed

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in charity. The will and the giving of the cheques have to be considered together, though I have only to decide upon the validity of the will. The only connected narrative of what occurred as to both matters is given by Father Kernan. He and the testator did not become acquainted till October 1891, when he came from Geelong to take charge of St. Joseph's Church, Collingwood, and received rent which the testator had collected as trustee.

Father Kernan in his evidence said :—

"Mr. Walsh said he would be glad to see me at his house, and I made a habit of calling on him at least once a week. He was one of the guarantors of the church debt, but he did not attend the meetings, leading a retired life latterly. A little before Easter he had promised a donation of 10*l.* towards a church bazaar, and in speaking of that he said he had made a will with which he was not quite satisfied, although he gave no reason why he was not satisfied. He subsequently mentioned that will again, and as one reason for his dissatisfaction he mentioned the death of a son. Two or three months before his death he said he had left his money to the poor of Collingwood. I suggested that the money should be left more definitely, as trusts of that kind were sometimes frittered away. In May he said he had made up his mind to leave his property in charity. I said, 'What about your family?' and he said, 'They have enough,' and the like of that. On Saturday, 9th July, I told him I was going on a visit to Geelong, and he asked me straight if I thought he was going to die this time; 'because,' he said, 'if I am I will settle the deposit money and the will.' I told him I did not think he was going to die, but that he had a bad cold, and his age was against him. He said he wanted to leave something to the Little Sisters of the Poor, and I said the rev. mother had suggested that it would be a nice thing for him to give the altars for the new church at Port Melbourne, for which a Protestant was giving a stained glass window. Soon after Easter he had told me he would not leave any money behind, but as soon as he felt he was going to die he would transfer his deposit to current account, and then get rid of it. He added, 'But I have not as much as people think—only a few hundreds.' On Monday, 11th July, when he was ill, I went to see him before going to Geelong. In answer to him, I said I would be returning on the following Thursday, and he said, 'I will show you the old will next Friday.' I advised him to give up early mass at St. Patrick's. He had not then seen a doctor, but he said that if he did not get better he would consult a chemist. On Friday, 15th July, I returned to Melbourne, and found that he had not given up early mass. I again warned him, but he said he would take care of himself. Not a word was said about the will on that occasion. On Sunday morning, 17th July, I was sent for, the testator having fainted in his room, and when I saw him, in the presence of Mrs. Rhodes, his housekeeper, he said he was not prepared for communion, and he was not going to die that time. I had only been his father confessor on two occasions. The same day I saw him again, when he was in bed, and asked him if he would like to receive the last sacrament then, but he said he would not. After the evening service that night, however, he was anointed at his own request, and arrangements were made for his taking the sacrament on the following morning. There was no appearance in him of any derangement in intellect. The next morning, as I was preparing the sacrament, he produced a packet of papers and said, 'Take those, father, I am now done with the world.' I said, 'All right, we will talk about that afterwards,' and put the packet in my pocket. After the sacrament

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I saw the packet contained deposit notes; and he told me he wished me to place them to his current account in the English, Scottish, and Australian Chartered Bank, in Gertrude Street. I said, 'I suppose when these are placed to your current account you will be getting rid of them.' He made no answer. I transferred the deposit notes, which amounted to 1,007*l.* 2*s.* 6*d.*, to his current account. When he was offered the receipt which I had obtained from the bank manager, he just shook his head. I pointed out to him that, so far as getting rid of the money was concerned, he was no better off now, and he said, 'I will do that later. I will see you later in the day, and you can speak to me again.' He mentioned a will when he gave me the deposit notes. He said, 'I must settle my will if I don't get better.' On the Monday evening I saw him again, when he took from the bedclothes a handkerchief, from which he produced a cheque for 50*l.*, which he handed to me, and said, 'There is 50*l.* for Brother Tracey. I am now done with him. I promised him 100*l.* for the school in Nicholson Street. I have already given him 50*l.*' He then handed me another cheque, and said,' There is 50*l.* for masses and 200*l.* for Mahoney's house.' All the cheques were in his handwriting. Mahoney's house—a broken-down cottage—adjoined the church, and it had been arranged that the testator should purchase it for the church. When I was thanking him he said, 'I will settle that will to-morrow if I can; but I am very weak, and I am afraid I won't be much stronger.' He refused to have a lawyer or anybody to assist him in drawing up his will, as there was nobody he could trust, and he did not wish anyone to know his affairs. He said he would do it himself, and asked me to help him. I said, 'If I help to draw it up it may look suspicious. You really ought to get somebody else.' He said, 'No, I won't.' 'Well,' I said, 'if I have to draw it up I could do it better at home, if you give me instructions.' He said, 'When?' and I replied, 'To-night.' He said, 'Very well,' and appeared pleased. I said to him, 'What do you mean to do? Have you made up your mind? It is your money, and you can do with it as you like.' He did not answer, and I said, 'You must do as you like; the responsibility lies on you. The chief thing is to do as much good as you can. Have you quite made up your own mind?' He said, 'There are the Little Sisters.' I said, 'But what about the family? There are Hennessy and Sabelberg.' He said distinctly, 'I won't leave them anything;' and I said, 'Well, if you won't leave them anything, will you leave something to the children to be settled on them until they become of age or marry.' He said, 'Yes; very well.' I said, 'There is your son James;' and he said, 'Yes; and there is the daughter up the country.' I had not heard of her, and asked who she was; and he said she was the widow of his son Patrick; 'her children will be like the rest. Leave them all alike in equal shares.' He said he would leave 500*l.* to his son James, to whom he had been giving 30*s.* a week, and added that if the 500*l.* was paid to his son in that way it would last the lifetime of his son, who, in his opinion, would not live two years. He said he would leave 500*l.* to his housekeeper, who had been good to him. I said, 'Is there anybody else? Are there any more legacies?' and he said, 'No; I think not; I can do the rest with what I have in the bank.' I said, 'What about the bulk of the property? How do you mean that to go?' He said, 'There are the Little Sisters, and Collingwood, and Abbotsford.' I said, 'You mean the nuns?' and he said 'Yes.' He said something about the Archbishop. I asked him, rather surprised, if he was going to leave anything to the Archbishop, and he replied that he would not leave it to the Archbishop but to St. Patrick's Cathedral. I said, 'Will you leave it to him like the rest, and I will tell him your wishes?' and he replied, 'Very well.' I said, 'Is there anybody else?' and he said, 'There were the Sisters of Charity in the Parade.' I said to him then, counting on my fingers, 'There are three families of children, Abbotsford, Little Sisters, the Charity Nuns, and there is the Cathedral and

Collingwood. How do you mean to leave them—all equal, or what?' He said, 'Yes; leave them all alike.' I said, 'Very well, I will draw the will up this evening, and bring it to you to-morrow morning. And now, whom will you have as executors, for you must have one at least?' He said, 'There are generally two;' and, in reply to me as to whom he would have, said, 'There are Hennessy and Sabelberg; I don't think I can do better than have them.' There was nothing in his manner to indicate the least incompetence. I prepared the document that night, and next morning about a quarter to nine I saw the testator, who said he felt cold and weaker, and said, 'I cannot write those cheques. I will write one and make it all over to you, father, and you can afterwards distribute it in charity as I tell you.' I said, 'Very well; when will you do it?' and he said, 'Now; if you will get me my cheque book.' The cheque book was brought, and the testator, sitting up in bed without assistance, asked for his spectacles out of a particular case, and commenced to write out a cheque. He made a slip with the pen after writing in the date, and, as he looked distressed, I offered to fill in the body of the cheque, and did so, filling in the cheque, payable to myself, for 700*l.*, and he signed it. I said, 'Well, that worldly bother is off your mind. You'll soon be over now; there's only the will.' With regard to that, I said, 'You remember you told me to draw it up last night; I've done so;' and, taking it out of my pocket, said, 'I will read it for you now, if you like.' He said; 'Yes; do.' I then read it slowly, carefully, and distinctly. After my doing so, he said, 'That's just what I wanted.' 'Very well,' I said, 'if you're satisfied all you've got to do now is to sign it. When will you do it?' 'Now,' he said."

Father Kernan then states that he suggested as witnesses Miss Marks, the daughter of a tenant of the testator, and Mr. Doyle, a neighbouring hotelkeeper, who were sent for, and came in and attested the due execution of the will. The will was not read in their presence. After the will was signed, the 700*l.* cheque was produced. The testator went over his signature to it with a dry pen, and Mr. Doyle witnessed it. The doctor arrived just as the two witnesses were leaving. Father Kernan then went to the bank, and opened an account in his own name with the cheques given him by the testator, telling the bank manager that the money was to be distributed in charity if the testator died, and would be given back to him if he recovered. About twelve on the same day Farther Kernan went again to the house of the testator, who was still in bed, and his evidence as to what occurred is as follows:—

"I told him where I had been, and what I had been doing, and said, 'Now, you must tell me what I am to do with the money.' After a pause, he said, 'There are the nun's altars, how much do they cost?' I said, 'As much as you like, it all depends. They intend in the long run to have more than one, but they would be satisfied if they get the high altar out of you.' He said, 'I think so too,' and I offered to get the mother to give him an idea of the cost, and he agreed to that course. I said, 'What else?' and then came another surprise when he said, 'There

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are the Charity Nuns.' I said, 'That's lucky, for they are going to have a big bazaar in the Exhibition to wipe off their huge debt, and no doubt a few hundreds will come in handy for preliminary expenses.' He smiled when I mentioned 'a few hundreds,' and said, 'Give them 100*l.*' I said, 'Who else?' He said, 'There are several others. There's Mr. Tobin; I will remember him, for he is poor. There is Mrs. Mead, who has been a good neighbour for years, and you may put her down for 20*l.*' This was the mother of the witness to the will. He said, "There are others, but the housekeeper knows them all. I said, 'I will see her afterwards. It would be better for you to give me the names.' Then he said, 'There are the Sisters of St. Joseph at Surrey Hills, and you might give St. Vincent de Paul something for the poor, but the housekeeper will tell you all.' I saw that I could get nothing more out of him, and after his referring twice to the housekeeper he let the matter drop. The same evening I saw him again, asleep. I committed a portion of the testator's instructions to writing, making the following donations:—50*l.* for masses; 200*l.* to Rev. P. Kernan, as manager of St. Joseph's School; 120*l.* for the nuns' altars at Port Melbourne. The remaining items—100*l.* to the Fancy Fair; 20*l.* to Mrs. Mead; and the balance to such charities, persons, or institutions as the Rev. P. Kernan should decide—I did not fill in until the following day. The next day, the 20th July, I saw a great change for the worse in the deceased, who in answer to an inquiry said he felt poorly, and added "I am done for." I read his instructions to him, and asked him if he was satisfied, and he said, 'I have left all that to you, father.' He agreed to 120*l.* as the amount for the altars, saying he supposed it would be money well spent. As to the balance, he said, 'I leave that to you.' I said I would like further particulars from him, but he repeated that he would leave it to me. I told him the housekeeper had mentioned a Mr. Tobin and Mrs. Flanagan as persons he would like remembered, and he said he left that to me. Seeing I could get nothing definite, I wrote all the words following Port Melbourne in the paper I had brought, and said to him, 'Do you think, to oblige me, you could sign this paper. I want this for my own safety, because it might be said I was getting money for myself.' He said, 'I will try.' I called the nurse, Mrs. Schofield, and told her what the document was, and, at my request, she propped the testator up in bed. He tried to write, but said, 'I can't.' I asked him to try, but he failed a second time, and I then held and guided his hand, and Mrs. Schofield appended her signature as a witness. The testator died about one o'clock on the day on which he signed the paper."

Father Kernan's narrative of the giving of the cheques must be supplemented by other evidence, which shows that at 6 o'clock on the morning of Monday the testator, against the advice of his housekeeper and Mr. Sabelberg, who had been watching him, insisted on getting up, and was helped on with his clothes. He went to his safe, took out his cash-box, requested his housekeeper and Mr. Sabelberg to leave the room, closed the door, remained in the room alone for some minutes, then locked up his safe, returned to his bedroom, undressed and went to bed again. It was while he was thus alone that he possessed himself of the deposit receipts afterwards handed to Father Kernan, endorsed his name on them, and probably wrote the cheques for

50*l.* and 250*l.* handed to Father Kernan later in the day. This is an important incident, for no stronger evidence of spontaneity in the gifts of money could be afforded—insisting upon rising from his bed in the cold of winter's early morning, when unable to dress himself, and then unaided and secretly preparing the means by which he afterwards divested himself of his property. The evidence of Father Kernan as to the execution of the will is confirmed by the attesting witnesses. To one of them the testator apologised for the trouble he was giving. Neither of the witnesses observed any indication of incapacity. Evidence as to the testator's condition on that morning is also given by Mr. Limbert, a clerk sent from the bank to ascertain the genuineness of the cheque for 700*l.*, which had been given to Father Kernan. The will was executed about 9; Mr. Limbert called at the house about half-past 12, and his evidence is as follows:—

"I went into the bedroom with the housekeeper. She said to him, 'Here's a gentleman from the bank who wishes to see you about a cheque.' He looked at me. The housekeeper left the room. I said to him, 'I have a cheque for 700*l.* paid to Father Kernan, and I wish to know whether you signed it.' He looked towards the table and muttered something. I thought he wanted his spectacles. I got them and put them on his nose. He adjusted them. I gave him the cheque. He took it in both hands. I said, 'Did you sign it?' He said, 'It's all right; it's all right.' I said again, 'Did you sign it?' He replied, 'Yes, certainly.' So I said again, 'You signed it?' He said, 'I did.' I took the cheque from him and put it in my pocket. I took off his spectacles and asked him how he was—was he in pain? 'No,' he said. I said, 'I hope we shall soon see you in the bank again.' He smiled, and I asked should I send anyone to come in when I left. He said, 'No; when they see you come out someone will come in.' I shook hands with him and left him."

From the terms in which Father Kernan expressed the gift to himself in the will, and from what he said to several persons as to the object for which the cheques were given, I am satisfied that he was not seeking to benefit himself personally by his dealings with the testator, but this does not relieve him from the obligation of a person preparing a will under which he takes a benefit to satisfy the Court that no undue influence was used to procure it. I think he would have done more for his church than he would have done for himself, and as nearly five-eighths of the estate goes to the church, and all the facts as to the making of the will depend upon his evidence, the weight to be attached to his evidence is the first consideration. He gave it clearly, and as I thought truthfully,

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and I have no reason for distrusting any of the other evidence given in support of the will. The circumstances under which the will was made were undoubtedly suspicious, but when they are closely examined their aspect improves. As to the secrecy of the will, Father Kernan's statement that secrecy was desired by the testator is in a measure confirmed by the attesting witnesses, who say that the testator told Father Kernan not to leave the will where it would be seen. The witnesses to an old will, signed in 1883, remember that the testator put a piece of paper over the will when they witnessed it to prevent them from seeing its contents. As to the dispositions of the will, the small amount given to the family and the large amount given to charities, there is evidence to show that such a mode of distribution was consistent with what the testator had told some people he would do. His children and grandchildren were in such circumstances that he did not disregard any obvious duty to them by giving them as little as he did. They might reasonably have felt surprised and disappointed, but he might reasonably have justified to himself his actions with respect to them. The son to whom only 500*l.* was left had been a failure. Money spent on his education for a profession had been wasted, as was money afterwards paid to set him up in trade. The business did not succeed, and the son sold the stock and spent the proceeds. He took to drinking, and his father at the time of his death was making him an allowance of 30*s.* a week, paid through Theodore Sabelberg. Mary Walsh, the widow of his son, Patrick, with two children, received from the testator 2*l.* a week. By the will she gets nothing, but her children get a share worth about 2,300*l.* The families of the Sabelbergs and Hennessys were well-to-do. The children needed no support from their grandfather, though he had been in the habit of making them handsome presents, and had given cheques for their education. He had led the life of a recluse, going regularly to early mass and praying in his own house at regular intervals until the evening. Praying seems to have been the principal occupation of his later years. He had given largely to Roman Catholic churches and charities, presented windows and images, and assisted in various ways in raising money for church purposes. Some years ago he told his favourite daughter (now dead) that he intended to leave half of all he had to the poor, and

she remonstrated. He said to one witness that he intended to leave just enough to bury him and to pay for masses. To another, that he would give half his property to the churches; that the poor wanted it, his own people didn't. To another that he wouldn't leave a pound of ready money at his death; and recently to another, who was negotiating about renting an hotel from him, and speaking about the bonus which might be asked if a renewal were wanted, that he intended to leave all he had to charities, and that the tenant would have the charities to deal with when he was dead. In 1883 he made a will giving in perpetuity 5*l.* a year to the Benevolent Asylum, 5*l.* a year to the Nuns of the Good Shepherd, 5*l.* a year to the St. Vincent de Paul's Orphanage (boys' branch), and 5*l.* a year to the girls' branch of the same orphanage. Subject to this he gave all his property to his children and grandchildren, but he directed that after the decease of the last of his great-great-grandchildren all his property should go to the Roman Catholic Bishop of Collingwood. Coming from a man of this eccentric character, who had done so much and said so much to show his desire to benefit his church, the provisions of the will cannot be said in themselves to evidence the operation of any undue influence. But apart from the question of whether the mind of the testator was unduly influenced, I have to consider whether the mind of the testator was capable of exerting itself in the due exercise of testamentary power at the time when he made his will. The requisites of testamentary capacity have been stated in distinct terms by eminent judges. In the case of *Harwood* v. *Baker* (*a*), heard in the year 1840, Mr. Justice Erskine said in delivering the judgment of the Court:—

"The infirmity of mind suggested by the respondent, and relied on by the Court below, is not an incapacity arising from any delusion or from any constitutional or long-established infirmity of mind, but one occasioned by a recent accession of bodily disease affecting the brain and producing torpor, and thereby rendering the mind incapable of exerting those faculties which are essential to a sound and disposing mind and memory. Their Lordships are of opinion that in order to constitute a sound disposing mind a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in

(*a*) 3 Moore's P.C.C. 282.

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those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration, and therefore the question which their Lordships propose to decide in this case is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it; but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

The facts of the case in which these observations were made give them special force with reference to the case before me. The judges believed the witness who prepared the will, a solicitor unconnected with the parties, who took his instructions directly from the testator, and who said in his evidence, "No person interfered in giving me the instructions. The whole came from Mr. Baker's own lips. It was done in no haste. After I had written the will completely out, and fair for execution, I took it to the bedside and read it carefully and slowly and distinctly to Mr. Baker." There was no doubt that at the time the will was prepared and signed the testator knew that he was giving and wished to give all his property to his wife, but probate of this will was revoked because of the testator's impaired mental condition, and the inconsistency of this final disposition with a previous disposition of his property, in which a large interest was given to his relatives. The standard of mental capacity required by this old case has not been lowered by modern decisions. Sir James Hannen, the judge of the Probate Court, has laid down the rule to the same effect in *Burdett* v. *Thomson* (*b*), heard in the year 1873:—

"The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it. Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will . . . . . If you are at liberty to draw distinctions between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will . . . . . From the character of the act it requires the consideration of a larger variety of

(*b*) L.R. 3 P. & D., p. 72*n*.

circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims and of determining in what proportions the property shall be divided amongst the claimants, and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

In the case of *Boughton* v. *Knight*, reported in the same volume, p. 64, and decided by the same judge, he said, at p. 72:—

"Whatever degree of mental soundness is required for any one of these things—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness—I must tell you without fear of contradiction that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention."

This statement of the law has been referred to with approval by Mr. Justice Kekewich in the case of *Birkett* v. *Rind* (*c*), decided in 1890. I now proceed to consider whether there is proof of such mental competency at the time of giving instructions for and executing the will before me as would satisfy the requirements mentioned in the cases to which I have referred. The disease from which the testator died is stated by his medical attendant to have been diabetes insipidus. He did not die from the exhaustion which in old age may follow any common ailment. When Dr. Hewlett saw him on the 8th of July he thought the case hopeless. When he saw him on Sunday, the 17th, he thought that his death was merely a matter of hours. On the Sunday he lost control of his sphincters. The nurse brought to attend him on the Tuesday evening found him, as she describes it, lying like a log, incapable of giving sustained attention to any matter of business. His breathing was stertorous, and, according to some evidence, after the Sunday he had occasional seizures of a convulsive nature, which shook the bed under him. Dr. Hewlett attributes the fit, as it was called, of Sunday to sudden shock and failure in the heart's action, not marking any crisis in the disease. Dr. Jamieson, who was not in attendance, but heard the evidence of medical and other witnesses as to the man's condition, differs from Dr. Hewlett, and thinks that this fit marked an important stage in the progress of the disease, and that the loss of control

(*c*) 63 L.T., p. 87.

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over the sphincters supervening on the Sunday was due to the same disease, and showed that the brain had become affected by ureanic poisoning. Dr. Jamieson also differs from Dr. Hewlett as to the specific disease. He thinks it was Bright's disease of the kidneys, not diabetes insipidus. The nurse says that Dr. Hewlett told her that the testator had been suffering for some time from Bright's disease. There is no doubt that from Sunday morning the physical condition of the testator was such as to indispose him for mental effort, and it is, to say the least, doubtful on the medical evidence whether his brain was not then affected by the retention in the system of that which ought to have been eliminated. Apart from the medical testimony, there is slight evidence of the failing of mental power before the making of the will. I discard as utterly untrustworthy the evidence of Theodore Sabelberg, and receive with some reservation the evidence of Mrs. Sabelberg and Mr. Hennessy, who manifestly allowed their indignation to disturb their accuracy. I find that during his illness the testator had occasionally complained of loss of memory, of not being able to remember his prayers or the subjects of the windows he had presented to the church. On the 16th of July he could not recognise Mrs. Lewis, a lady with whom he was well acquainted, and he told her he had lost his memory. For some days before the Sunday he had given up attempting to read the newspaper. These indications, taken alone, might not have much significance, but in connection with other matters to which I shall advert they seem to me material. According to Father Kernan's evidence, within three hours of the signing of the will the testator could not, or would not, name all the persons to whom he wished money to be given, but referred him to the housekeeper for information. He says: "I saw that I could get nothing more definite out of him, and after referring twice to his housekeeper he let the matter drop." On the Wednesday morning the testator was admittedly incapable of expressing his wishes on the subject. Father Kernan brought a paper of instructions, partly written and to be completed from further particulars to be furnished by the testator, but finding that the testator was incapable of giving him these particulars, he completed the paper according to his own supposition of what the dying man intended, and then procured his signature to the

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completed document, to part of which he had given no intelligent assent. This proceeding is not to be forgotten in estimating the latitude which Father Kernan might allow himself in reducing to written form the dispositions which he supposed that the testator had approved of. That which weighs most with me as against testamentary capacity is the omission of any provision for a Mrs. Savage, who describes herself as a cousin of the testator—not because of any duty on his part to provide for her, but because it is plain to me that he would have made provision if he had remembered her; and his relations to her were such that, if his mind had been sound, he could not have forgotten her. In the year 1888 he had placed a sum of 300*l.* on fixed deposit in the English and Scottish Chartered Bank in her name and his own, taking her to the bank to give her signature. This deposit was renewed from time to time in the same manner, the last occasion being in February 1892. A memorandum is in evidence, then written by him to her, telling her to call at the bank and sign her name again. His declared object in doing this was that she might have the money after his death, and an arrangement was made with the bank that the money might be paid to either of them on delivering up the receipt and on the signature of the bearer. She lived rent free in one of his houses. Every quarter for years past he paid her 5*l.* by his own cheque. The butts are in evidence, filled up in his own writing, the last dated 1st June 1892. Such were the recurring acts which kept her in his mind, and showed his unchanging goodwill towards her. Yet we find her deposit receipt handed over by the testator to Father Kernan to be paid to the testator's private account without any reference to her interest. When those to whom legacies or money gifts were spoken of not a word was said about her. I cannot attribute this omission to mere mischance. I think it arose from loss of memory caused by disease. It was contended that the omission to refer to her amongst the persons to whom gifts were to be made was after signing the will, and therefore immaterial, but it was only three hours after, and no new development of his disease had occurred within that time. And on the Monday morning, before any instructions were given for the will, she must have also been forgotten. The testator would not have given her deposit receipt to be placed to his current account if

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he had been in full possession of his faculties. He would have separated it from the others, and when he gave it to Father Kernan he would have told him to hand it to Mary Savage. It has been urged that the conversations deposed to by Father Kernan show such intellectual activity and clear recollection as to other persons to be benefited as to be incompatible with impaired understanding, but they have not this effect on my mind. Though I think that Father Kernan has told the truth, I cannot forget that he had a strong personal interest, which, while he conversed with the testator, would incline him to construe favourably every ambiguous utterance or gesture, and while under examination to give himself the benefit of any doubt on a matter on which his recollection was imperfect. That his interest was for his church—not for himself—would strengthen rather than weaken this inclination. Taking his own version of what occurred, the testator's part in the testamentary performance seems to have been rather assenting than originating. In that most important matter, the proportions in which the estate was to be divided, Father Kernan said, "How do you mean to leave them—all equal or what?"—a suggestion accepted, not a direction given, by the testator. A conversation such as Father Kernan describes between a man in health and an ordinary adviser might fairly be taken to express the uninfluenced wishes of the testator, but when one party to the conversation knows he is dying and the other is his spiritual consoler, other considerations arise. Thomas Walsh had bidden farewell to this world, and Father Kernan had solemnly prepared him for another when he discussed with him the disposal of his property. Suggestion might then seem like advice, which it would be sinful to reject. I do not suspect the priest of subjecting the penitent to any kind of spiritual duress. I only regard the inevitable consequence of their relation to one another at a time when beyond all question the vital force of the dying man was rapidly subsiding, and he was incapable of sustained mental effort. I also think that his brain was affected by the disease to which he succumbed. On all the facts of the case I cannot accept the will as the outcome of a sound mind able to deal with those considerations which the testator must be capable of dealing with in order to make a valid will. The law allows him complete freedom of disposition. He may now give to purposes which in

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former days would be illegal as superstitious. He may give all to charities, and leave widow and children burdens on the State, but the law requires that it shall be clearly shown that he knew what he was doing, and was able to judge of the act in its different bearings. For the peace of families and for protection from designing advisers it is well that a high standard of competency is required. If a testator, as in this case, waits the approach of death to do that which should have been done when his faculties were unimpaired, the possible failure of his testamentary intentions is caused by his imprudent procrastination. The propounder of the will in this case has not sustained the onus which the law casts upon him of proving that the will was the act of a competent testator. I have hesitated as to whether I should allow him costs out of the estate, though he fails in establishing the will. This has been done in some cases where the person seeking to prove the will has been in no way responsible for the cause of its rejection. Considering the time at which the will was made, and the purposes to which it applied the bulk of the testator's property, there was known risk and strong inducement to incur it. Father Kernan made no inquiry of the medical attendant as to the testator's mental condition. For these reasons I shall not exempt Father Kernan from all the consequences of unsuccessful litigation. I give no costs against him. I discharge the rule without costs, direct taxation of caveators' costs, and order that their costs be paid out of the estate of Thomas Walsh.

Solicitors for applicant: *J. Gavan Duffy & King.*
Solicitor for caveators: *Sabelberg.*

A. J. A.

F.C.
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Dec. 6, 7, 14.

THE VICTORIAN MORTGAGE AND DEPOSIT BANK LIMITED *v.* THE AUSTRALIAN FINANCIAL AGENCY AND GUARANTEE COMPANY LIMITED AND LUCAS.

Companies Act 1890 (*No.* 1074), *sec.* 68—*Security for costs where company in course of voluntary liquidation.*

Sec. 68 of the *Companies Act* 1890 applies to companies in the course of voluntary liquidation, and therefore, under that section, a judge has discretionary power to order a company in course of voluntary liquidation, when plaintiff, to give security for costs to a defendant in the event of the latter's success.

SUMMONS referred to the Full Court by Hood, J. The summons was one calling upon the plaintiff company to give security for costs under sec. 68 of the *Companies Act* 1890. The plaintiff company was in course of voluntary liquidation. The facts appear sufficiently in the judgment.

Isaacs and *Pigott*, for the defendants, in support—The case of *Freehold Land and Brickmaking Co.* v. *Spargo* (*a*) is an authority for this application. It makes no difference that the society is in voluntary liquidation. The case cited has never been doubted.

Counsel cited *City of Moscow Gas Co.* v. *International Financial Society* (*b*); *Northampton Coal, etc., Company* v. *Midland Wagon Co.* (*c*); *Pure Spirit Co.* v. *Fowler* (*d*); *Madrid Bank Limited* v. *Bayley* (*e*); *United Ports Insurance Co.* v. *Hill* (*f*); *In re Winterbottom* (*g*).

Weigall for the plaintiff to oppose—The English decisions do not apply to this case. This 68th section is under division 3 of the Act, which does not relate to companies being wound up, and does not apply to companies in course of liquidation. By the *Acts Interpretation Act* 1890, sec. 21, the headings of parts and divisions of Acts are to be deemed to be part of the Act: *Hitchins* v. *Mayor, etc., of Port Melbourne* (*h*). If this section is held to

(*a*) W. N. 1868, p. 94.
(*b*) L.R. 7 Ch. 225.
(*c*) 7 Ch.D. 500.
(*d*) 25 Q.B.D. 235.
(*e*) L.R. 2 Q.B. 37.
(*f*) L.R. 5 Q.B. 395.
(*g*) 18 Q.B.D. 446.
(*h*) 15 V.L.R., at p. 779.

apply to a company in liquidation, then great inconvenience will arise, for shareholders might combine to resist actions for calls without any justification, and might prevent the company from exercising its rights against other shareholders. He cited *Madrid Bank* v. *Pelly* (*i*); *Bailey and Leetham's Case* (*k*); *In re Home Investment Society* (*l*); *In re Dominion of Canada Plumbago Co.* (*m*); *Lindley on Companies* (5th ed.), 864, 855.

Isaacs in reply cited *Ebrard* v. *Gassier* (*n*); *Whittaker* v. *Kershaw* (*o*); *Limerick and Waterford Railway Co.* v. *Fraser* (*p*); *Kilkenny, etc., Railway Co.* v. *Fielden* (*q*).

Cur. adv. vult.

HIGINBOTHAM, C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOLROYD and HOOD, JJ.]. This was a summons to the plaintiff company to give security for costs. The application was made under sec. 68 of the *Companies Act* 1890. The action was brought, in effect, to recover calls. It was an action in which the plaintiff company sought to obtain the substitution of the defendant company for the defendant Lucas in respect of a large number of shares in the plaintiff company standing in the name of the defendant Lucas, and an order that the defendant company should pay the calls upon these shares, or in the alternative it was asked that the defendant Lucas should pay these calls. Sec. 68 of the *Companies Act* 1890, on which this application rests, is in these terms:—

"Where a limited company is plaintiff in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if he have reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

A number of English cases were cited by counsel for the defendant company in support of this claim for security for costs—cases

(*i*) L.R. 7 Eq. 442, at p. 449.
(*k*) L.R. 8 Eq. 94.
(*l*) 14 Ch.D. 167.
(*m*) 27 Ch.D. 33.
(*n*) 28 Ch.D. 132.
(*o*) 44 Ch.D. 296.
(*p*) 4 Bing. 394.
(*q*) 6 Exch. 81.

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which ranged from the year 1868 down to the year 1890—in all of which it was held that where it appeared that a company was in liquidation that fact constituted *prima facie* a ground for applying for security for costs against such company. One of these cases, the last, *The Pure Spirit Company* v. *Fowler* (*r*), was a case like the present, in which the plaintiff company was in voluntary liquidation. This claim was resisted by the plaintiff company upon two grounds. It was contended by Mr. Weigall in the first place that the English decisions were erroneous, and were founded upon an oversight of the effect of this 68th section, considering the place in which it stands in the first part of the *Companies Act* 1890, and that these decisions, if followed, would lead to consequences highly inconvenient. It was argued that this section occurs in division 3 of Part I. of the *Companies Act* 1890, which relates to the management and administration of companies and associations, and it was contended that inasmuch as this section was placed in this division and not in division 4, which relates to the winding up of companies and associations, it did not apply to companies in the course of liquidation but only to companies which, not being in liquidation, could be shown to be unlikely to have sufficient assets to meet a defendant's costs in the event of the defendant's being successful. We think that that argument is not only opposed to the authority of a long series of English decisions in which this objection does not appear to have been raised, but that it is opposed to the proper construction of the extent and application of these two divisions of this part of the Act. A company in the course of liquidation is not a company which has ceased to be an existing or going company. A company in liquidation is a company whose business is to cease from the date of the commencement of the winding-up, by sec. 117 of the Act, except in so far as may be required for the beneficial winding-up of the company, but for that purpose, viz., the beneficial winding-up, a company in voluntary liquidation is still a going company, and the liquidator possesses all the powers given by the Act to an official liquidator. Now these powers include the exercise of powers contained in division 3, Part I., of the Act relating to the management and administration of existing companies and going associations,

(*r*) 25 Q.B.D. 235.

and for the purpose of a beneficial winding-up the exercise of these powers may be, and often are, necessary, and consequently the position of this sec. 68 appears to us to be the proper position, and the one in which the section should be placed, and that being placed in that position it applies not merely to companies which before liquidation are going companies, but also to companies which during the course of liquidation but before final dissolution may be or are carried on for the purpose of being beneficially wound-up. It was also argued that great inconvenience might arise if it were held in accordance with the opinions of some of the judges given in some of the English cases, that an order under this section is an order *ex debito justiciæ* as soon as it appears that a company is in liquidation, and that if that view of the section be adopted it would operate in all cases in which a liquidator is seeking to enforce calls with extreme injustice, or at all events with great inconvenience, and it was contended that a case might occur in which a shareholder might resist an action for calls without any justification, and might deprive the company of the means of enforcing its rights against the other shareholders. It was said that if all the shareholders acted upon that view of the section it might be that they by combination might prevent the recovery of any calls. We do not take that view of the legal effect of this section. We think that this section gives a discretionary power to the judge to be exercised in view of the circumstances of each case, and if the circumstances of each case be regarded in that light no serious inconvenience could arise from giving effect to the power contained in the section. Further, in actions of this particular kind, viz., actions to recover calls, it must be remembered that a liquidator has additional power to that of recovering calls by action. The liquidator of a company being voluntarily wound-up is empowered by sec. 124 of the *Companies Act* 1890 to apply to the Court for leave to exercise as respects the enforcement of calls all or any of the powers which the Court might exercise if the Company were being wound-up by the Court, and therefore in respect of actions for calls no such inconvenience as that referred to could be felt, since it might be avoided by reverting to a different course of procedure. We are of opinion that this section has been correctly interpreted by the decisions that have been cited, and that both

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upon authority and upon reason it must be held that where a company is shown to be in the course of voluntary liquidation, that fact alone is *prima facie* a ground for calling upon that company, when a plaintiff, to give security for costs to a defendant in event of the latter's success. It was then argued that this *prima facie* ground, on which this application rests, has been removed, inasmuch as from the answering affidavit of one of the liquidators it appears that this company has sufficient assets to pay the costs of the defendant in event of the defendant being successful. This liquidator made an affidavit in which he states:—

"That the assets of the plaintiff company consist of the sum of at least 5,000*l.*, uncalled capital about 156,000*l.*, as well as other assets.

"That the assets of the plaintiff company will be sufficient to pay the costs of the defendant company if successful in this action."

These statements, with the exception of one, appear to us to be highly ambiguous. There is only one definite statement in those two paragraphs of the affidavit, viz., that the plaintiff company's assets consist of a sum of at least 5,000*l.* in cash, and if there were any security that the plaintiff company would have assets of that amount—5,000*l.* cash—at the time and in the event of the defendant being successful that might be a satisfactory answer to the claim; but in the absence of any order made to set aside a portion of these assets, or of any offer by the liquidator to set them aside, no duty is cast upon the liquidator to refrain from applying these assets in discharging debts and dividends in the course of the liquidation, and it might be that if the defendant should succeed he would find that the plaintiff company had no cash assets or any assets at all. He would undoubtedly be entitled, if successful, to priority over the other creditors at that time, but he asks now that if successful he may have some security for his costs, and we think that he is entitled to have that demand complied with. We think that the order should go, and that the plaintiff company should be required to give security to the satisfaction of the prothonotary in the sum of 200*l.* for the costs of the defendant if successful. The summons will be allowed with costs.

Solicitors for the applicant: *Ellison & Simpson.*
Solicitors for the respondent: *Davies, Price & Wighton.*

A. F. M.

IN THE WILL OF ALEXANDER BISHOP.

F.C.

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Oct. 14, 17.
Dec. 20.

Administration and Probate Act 1890 (*No.* 1060), *ss.* 19, 40, 41, 42, 45—*Sealing foreign probates—Caveat—Time within which caveat may be lodged.*

A caveat had been lodged against the affixing of the seal of the Court to a foreign probate. The rule *nisi* relating to this caveat was dealt with by the Court, and on 6th September judgment was delivered, the order made absolute, and the Registrar directed to affix the seal of the Court to the probate. Before this order was drawn up, on 9th September, a second caveat was lodged against the application to affix the seal.

Held, that as the Court had ordered the document to be sealed on the 6th September, the second caveat was lodged too late, and that the Registrar was bound to affix the seal in accordance with the order of the Court.

THIS was a motion referred to the Full Court by A'BECKETT, J., for an order that the Registrar of Probates be ordered to affix the seal of the Supreme Court to the probate of the will of Alexander Bishop, granted by the District Registrar at Belfast of the Probate and Matrimonial Division of the High Court of Justice in Ireland, on the filing of an affidavit by W. Jardine, the attorney-under-power of John Bishop, one of the executors named in the will; that no other caveat had been lodged at the time of the delivery of the judgment of Hodges, J., on 6th September 1892, making absolute a rule for such seal to be affixed on payment of the duty payable in respect of the estate. All the facts material to this report are recited in the judgment of Higinbotham, C.J.

Topp and *Kilpatrick* to support the motion—The second caveat was lodged too late. The first caveat had been dealt with, and the order *nisi* in that matter had been made absolute. As soon as the order was made absolute the applicant was entitled to have the probate sealed, provided that there was at that particular time no caveat in existence. The judgment of the Court directing the rule *nisi* to be made absolute was a direction to the Registrar of Probates to affix the seal of the Court to the probate. The mere fact that a formal order has to be drawn up for the information of the Registrar cannot affect the rights of the applicant, which were vested in him by the judgment of the Court. The order speaks from the time when it is pronounced, and the ordinary delay arising through the drawing up of the order cannot

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affect or prejudice the applicant. There is no authority to show that where one caveat has been dealt with another person can come and lodge another, and fight the case over again upon precisely the same grounds and charges. The matter is *res judicata*.

Counsel referred to the following cases dealing with the procedure relating to caveats:—*In re Sharrartt* (*a*); *In re Grey* (*b*); *Graham* v. *Edwards* (*c*); *In the Goods of Carroll* (*d*); *In re Kennedy* (*e*); *In re Woolff* (*f*); *In re Lansell* (*g*).

Higgins to oppose the motion—By sec. 42 of the *Administration and Probate Act* 1890 any person may lodge a caveat at any time up to the time the seal of the Court is affixed. The finding of the Court upon one caveat cannot bind a person who was not a party to the proceedings. The application to have the seal affixed is in this case premature; no duty has yet been paid, and until the payment has been made the seal of the Court cannot be affixed. The Court had only power to order the caveat to be sealed as against the parties to the first proceeding, but the present caveator has had no chance of being heard, and was not in any way represented at the former hearing. Until all the formalities prescribed by the Act have been complied with the registrar cannot affix the seal, and until the seal is affixed any person may lodge a caveat.

Kilpatrick in reply cited *Reichel* v. *Magrath* (*h*); *Willis* v. *Earl Beauchamp* (*i*).

Cur. adv. vult.

Dec. 20. HIGINBOTHAM, C.J. This was a motion referred to the Full Court by A'BECKETT, J., that the Registrar of Probates be ordered to affix the seal of the Supreme Court to the probate of the will of Alexander Bishop, granted by the District Registrar, at Belfast, of the Probate and Matrimonial Division of the High Court of Justice in Ireland, on the filing of an affidavit by William Jardine, attorney-

(*a*) 14 V.L.R. 114.
(*b*) 11 V.L.R. 760.
(*c*) 2 V.R. (I.) 57, at p. 59.
(*d*) 1 W.W. & A'B. (I.) 66.
(*e*) 1 W. & W. (I.) 16.
(*f*) 1 V.L.R. (I.) 31.
(*g*) 7 V.L.R. (I.) 22.
(*h*) 14 App. Cas. 665.
(*i*) 11 P.D. 59.

under-power of John Bishop, one of the executors named in the will, that no other caveat had been lodged at the time of the delivery of the judgment of Hodges, J., on 6th September 1892, making absolute a rule for such seal to be affixed on payment of the duty payable in respect of the estate.

The first caveat was lodged on behalf of Matthew Lang, Alexander Scott, and David Hood Valentine, executors under the previous will of Alexander Bishop. After the delivery of judgment on 6th September in favour of the attorney-under-power of John Bishop, and before the order absolute was drawn up, another caveat was lodged with the Registrar on 9th September by Thomas Henley Henderson, who alleged that he had an interest in the property of the deceased. The Registrar of Probates was thereupon applied to by the solicitor of Mr. Jardine to disregard the second caveat, and to affix the seal of the Court to the probate in pursuance of the order. The Registrar required that an affidavit should be made that no caveat had been lodged up to the date of this application to him. He based this demand upon the practice of the Court in cases of applications for the grant of original probates or letters of administration in accordance with which the Court usually directs, upon the making of the order absolute, that the grant of probate or administration be made to the applicant upon its appearing that no further caveat has been lodged up to the day of making such grant, and, failing such direction, it has been the invariable practice that a further application is made to the Court as for probate or administration in the usual way, and upon the usual affidavit that no caveat has been lodged up to the morning of the application. This practice is in accordance with the general provisions relating to original Victorian probates and administrations (*Administration and Probate Act* 1890, sec. 18), whereby any person is allowed to lodge with the Registrar a caveat against any application for probate or administration at any time previous to such probate or administration being granted. In the corresponding section 41, relating to caveats against the sealing of foreign probates and letters of administration, no limit of time is expressly fixed within which caveats may be lodged.

It has been argued by Mr. Higgins, who appeared on notice of the motion for the new caveator, that every person has a statutory

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right under sec. 41 to lodge a caveat; that the Registrar is not bound, pending the payment of duty and the verification, where necessary, of the copies of the documents deposited with him, to cause the seal of the Court to be affixed; and that this caveat was lodged in time, inasmuch as these essential preliminaries had not been complied with before the caveat was lodged.

The difference above pointed out between secs. 18 and 41 supplies, in my opinion, the explanation of the mistake which we think the Registrar of Probates has made in this case. Part I. of the Act relates to the grant of original Victorian probates and letters of administration. As to these it is clearly the intention of the Legislature that every person who claims an interest in the estate of a deceased person should have an opportunity, up to the time the grant is actually made to an applicant for probate or administration, of asserting his own rights and resisting the claim of the applicant. Part III. relates to the means specially provided by the Legislature for giving effect in Victoria to probates and letters of administration already granted by a court of competent jurisdiction in the United Kingdom or any of the Australian Colonies. Some such ancillary means are necessary in all cases where the testator or intestate has died leaving property outside his domicile at the time of death and outside the jurisdiction of the Court which has granted the original probate or letters of administration. As between independent countries the right of a foreign executor or administrator to ancillary probate or administration in respect of personal property is generally acknowledged *ex comitate*, and is usually admitted as a matter of course: See *Story, Conflict of Laws*, § 512, 513. Where, as in the present case, the Legislature does not admit the absolute right of the executor to ancillary probate, but allows to objectors certain opportunities of contesting the executors' claim, we might expect to find those opportunities more limited than those that are allowed by the Legislature in a case where the testator's has not previously submitted to judicial proof and established by the judgment of a court of competent jurisdiction. The provisions of Part III. give effect, I think, to this distinction between proved and unproved wills, and while not forbidding in the former case the employment of caveats altogether, they confine the right of

caveators to lodge caveats to the time prior to the "application" of the applicant for sealing. That this is so in the case where no caveat has been lodged appears from sec. 42. The "application" mentioned in this section has been regarded, and I think rightly, as an application that should be made to the Registrar of Probates. He is the officer to whom the original probate or letters of administration, the power of attorney (where the executor or administrator acts by attorney), and the affidavit that the power of attorney has not been revoked, are to be produced; it is in his office that verified copies of these original documents are to be filed and deposited (sec. 40); it is with him that caveats are to be lodged (sec. 41); and he is invested with special authority to hear, receive, and examine evidence for the purpose of the verification of any probate or letters of administration (sec. 45). Proof by affidavit of the publication of the advertisement, and that no caveat has been lodged up to the morning of the application to the Registrar, enables that officer, who then has or ought to have before him verified copies of all the originals that have been produced to him, and the caveats, if any, that have been lodged, to determine that the seal of the Supreme Court shall be affixed, or if a caveat or caveats have been lodged, to leave the application to be made to the Court for its decision. No means are provided by which effect can be given to a caveat lodged after application to and determination by the Registrar, and before the duty has been paid and the seal has been actually affixed, and hence it must be concluded, I think, that the day of application to the Registrar is, where no caveat has been theretofore lodged, the limit of time after which no caveat can be lodged.

Where a caveat against sealing has been lodged after publication of the advertisement and before application has been made to the Registrar and affidavit filed, the caveat is to have the same effect and is to be dealt with in the same manner as if it were a caveat against the granting of probate or of letters of administration: Sec. 41. In this case the applicant must go to the Court and apply for an order *nisi* calling on the caveator or caveators to show cause at a time to be named why the seal should not be affixed, and the applicant is bound to bring before the Court by affidavit all the materials, including the caveats lodged up to the date of the

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application for the order *nisi*, upon which, if there had been no caveat, the seal of the Court would have been directed by the Registrar to be affixed under sec. 42: See sec. 19. The Court is thus placed, where there has been a caveat, in the same position as the Registrar of Probates is placed in where there has been no caveat, and is enabled, with or without trial of questions of fact by a jury, to determine whether the seal of the Supreme Court should be affixed to the probate or letters of administration. The day of application to the Court for an order *nisi* when a caveat has been lodged is to be taken, in my opinion, for the like reason as where no caveat has been lodged, to be the limit of time after which no caveat can be lodged.

In both cases, where the sealing is determined by the Registrar of Probates and where it is ordered by the Court, it remains the duty of the Registrar to see that the probate stamp and other duties, if any, have been paid before he submits the probate or letters of administration to the Chief Justice as the custodian of the seal of the Supreme Court, and asks that the seal be affixed.

In the present case the Registrar of Probates ought to have disregarded the caveat lodged after the application for the order *nisi*, and proceeded to procure the seal to be affixed upon proof that the Court had made the order *nisi* absolute, and that the duty had been paid. The applicant appears to have neglected to furnish proof to the Court by affidavit, on application for the order *nisi*, that the verified copies and affidavits had been filed and deposited in the office of the Registrar.

The order of the Court upon the motion will be, that upon filing and depositing verified copies of the original documents and the affidavits, and upon proof to the satisfaction of the Registrar that the probate stamp and other duties, if any, have been paid, the Registrar shall cause the probate to be sealed with the seal of the Supreme Court. The summons, as so altered, will be allowed, but without costs, as the second caveator was not a party to the motion, and was not bound to appear.

WILLIAMS, J. I agree with the conclusion stated in the judgment which has been read by the Chief Justice, and I also equally agree with a great deal contained in the judgment and many of the

reasons given therefor; but I am not prepared to assent to all the reasons contained in it. On the question of costs it would at the first appear right that the applicant ought to be entitled to his costs, because it might be said that this proceeding was rendered necessary by the wrongful act of the second caveator, but it appears on the examination of the circumstances that the second caveator was not a necessary party to this proceeding. The notice of motion is not addressed to him, but to the Registrar, and the second caveator was not bound to attend and oppose the motion. The applicant gave the second caveator an intimation that he was going to make this motion, and left him to attend or not, just as he pleased. I agree, therefore, with the order made as to costs.

HODGES, J. I desire to state my reasons very shortly for concurring in the conclusion arrived at by the Court. The joint operation of secs. 40 to 45 inclusive shows that the application to seal is to be made to the Registrar in all cases where no caveat has been lodged. Secs. 19, 29, and 41 show that where a caveat has been lodged application is to be made to the Court. Sec. 19 explains what that application to the Court is. It is an application to the Court not to set aside the caveat, but in the case of probate it is a rule calling upon a particular person to show cause why probate should not be granted, and in the case of sealing it is a rule calling upon some person to show cause why a document should not be sealed. It is important to bear in mind that it is an application to the Court not to set aside a caveat but to have a document sealed. Sec. 19 shows what is the form of the rule, and the rule shows that the application is to have a particular document sealed. Now assuming that the Probate Court was constituted by the same individual sitting continuously all through the proceedings, then on one day a rule is granted calling upon a particular person to show cause why the document should not be sealed, and on the next day that person is heard in opposition to the application, and on a subsequent day it is ordered—not that the caveat should be set aside—but that the seal of the Court should be attached to the document. That, in my opinion, is this case, and this document therefore had been ordered by the Court to be sealed before the second

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caveat was lodged. Now if a caveat be a caution to the Court, warning the Court not to do something, that caution or warning comes too late if it comes after the Court has ordered that thing to be done to prevent the doing of which the caveat was lodged or the warning given. I therefore think that this document ought to be sealed.

Solicitors for applicant: *Lawson & Jardine.*
Solicitor for caveator: *Manton.*

W. H. M.

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Sept. 13, 14, 30.
Hood, J.

JACKSON *v.* JACKSON.

Husband and Wife—Marriage Act 1890 (*No.* 1166), *s.* 74—*Dissolution of marriage—Domicil—Domicil of husband—Domicil of wife—Jurisdiction—Marriage in Victoria:*

The parties were married in Victoria in 1872, and were domiciled and lived in Victoria until 1884, when the husband abandoned his domicil in Victoria, and acquired another in New South Wales. In 1886 he left his wife at her parents' house in Hay, New South Wales, to seek for work, and she had never seen him since. For two years he corresponded with her, sending her small sums of money. His last letter, in 1888, stated that he was going to Grey Range, in New South Wales. He subsequently went to Broken Hill, New South Wales.

In February 1890 the wife returned to Victoria, and had since resided there, making it her home, and earning her living there.

Held, that the Court had no jurisdiction to entertain a petition for divorce unless the petitioner is domiciled in Victoria at the time of the presentation of the petition.

Held further, that the fact that the marriage was celebrated in Victoria did not affect the question of jurisdiction.

Held also, that the term "domiciled" in sec. 74 of the *Marriage Act* 1890 (No. 1166) was not equivalent to "resident," and the residence of the wife in Victoria for two years immediately preceding the marriage did not make her a "domiciled" person within the meaning of the section.

Held also, that a wife domiciled in another country and there deserted cannot acquire domicil by coming to Victoria to reside.

PETITION by wife against husband for dissolution of marriage on the ground that the husband had, without any just cause or excuse, wilfully deserted his wife, and without such cause or excuse left her continuously so deserted during three years and upwards, and on

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the ground that the husband had during three years and upwards been an habitual drunkard, and had habitually left his wife without the means of support.

The facts and the arguments sufficiently appear from the judgment.

No appearance for the respondent.

Neighbour for the petitioner.

Cur. adv. vult.

Sept. 30

HOOD, J. Petition by wife against husband for divorce upon the grounds of (1) desertion, and (2) habitual drunkenness and leaving the wife without means. The parties were married in 1872 at Guildford, in Victoria, and lived together at various places in this colony till 1883. In that year the respondent was in monetary difficulties, and the petitioner went to her parents at Hay, in New South Wales, where her husband joined her in 1884. They lived together there till October 1886, when he left her in order to seek for work, and she has never seen him since. For two years he corresponded with her, sending her small sums of money, and his last letter was in 1888, when he stated that he was going to the Grey Range, in New South Wales. She next heard of him recently at Broken Hill, New South Wales, where he had expressed his intention of going when he left his wife in 1886. In February 1890 the petitioner returned to Melbourne to earn her own living, and has resided here since, making it her home and working to support herself. Upon the evidence I was not satisfied as to the second ground of the petition, but it was proved that since 1886 the husband had wilfully deserted his wife without just cause or excuse, and left her continuously so deserted during three years and upwards. This would entitle the petitioner to the relief she sought, but for a difficulty arising out of the fact that the respondent has, since 1884, abandoned his domicil in Victoria and acquired another in New South Wales, and the question arises whether, under these circumstances, this Court has any jurisdiction. Sec. 74 of the *Marriage Act* 1890, under which this petition is brought, provides that "any married person who at the time of the

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institution of the suit shall have been domiciled in Victoria for two years and upwards may present a petition," and that "a domiciled person shall for the purpose of this section include a deserted wife who was domiciled in Victoria at the time of desertion, and such wife shall be deemed to have retained her Victorian domicil, notwithstanding that her husband may have since the desertion acquired any foreign domicil."

It was first contended in support of this petition that the period of two years referred to as the length of domicil required might be any two years prior to the presentation of the petition, and that, as these parties had after marriage been living here for two years, therefore the case came within this section. There is some force in the argument, having regard to the phraseology of sub-secs. (c) and (d): see *Hodgkinson* v. *Hodgkinson* (*a*), but I do not think it correct. In my opinion, the Act only gives the Court jurisdiction to entertain petitions from persons who are at the time of the suit domiciled in this colony. The use of the words "at the time of the institution of the suit" point to this conclusion, as they would be superfluous in any other view, and this seems the natural interpretation of the section, remembering that, "as a general principle . . . jurisdiction in matters of divorce depends upon the domicil of the parties to a marriage at the time of the commencement of the proceedings for divorce:" per Lopes, L.J., in *Goulder* v. *Goulder* (*b*).

It was then contended that the word "domiciled" was not used in any technical sense, but was merely equivalent to "resident," and that as the petitioner had resided here since February 1890 she was within the section. This I think is clearly wrong. When in an Act like this, treating of a special subject, a word having a special meaning is used, it should be taken to have been used in that meaning, unless a very plain expression of a contrary intention appears. So far from any contrary intention appearing, however, the application of the word in the end of the section shows that it is used in its technical sense, and in none other.

It was next argued that, as this marriage was celebrated in Victoria, this Court could dissolve it apart from any question of domicil. But this argument gives the go-by to the section

(*a*) *Ante* p. 394. (*b*) [1892] P.D., p. 243.

altogether, which cannot be done, as it is upon that section that the jurisdiction of the Court to entertain the petition depends. And apart from this view, the mere fact of this being the place of contract would not give jurisdiction to dissolve a valid marriage, though the matter of the validity of a marriage can be inquired into where that marriage took place: *Simonin* (*falsely called Mallac*) v. *Mallac* (*c*).

Lastly it was argued that this petitioner has acquired a domicil here since 1890, apart from that of her husband, and has thus the right to bring this suit. The general principle that the wife's domicil is necessarily that of her husband is clear, and well settled by authority. That principle is recognised by this same sec. 74, when it provides that a wife domiciled in Victoria at the time of desertion shall be deemed to retain her Victorian domicil, although the husband may acquire a foreign domicil. This provision of the Act would imply that in other cases the wife's domicil would follow the foreign domicil of her husband, and that she could not get relief under this section. Mr. Neighbour, however, for the petitioner, contended that this principle as to the wife's domicil following the husband's was not of universal application, and he cited several authorities which he urged supported his view. The first was a decision of this Court in *Ho-a-Mie* v. *Ho-a-Mie* (*d*), where it was held that there was jurisdiction upon facts somewhat like the present. But that petition was presented under "*The Marriage and Matrimonial Causes Statute* 1864," and Higinbotham, J., based his judgment upon the extensive words of that Statute. Stawell, C.J., however, apparently assumed this point, and used language that may support the contention for the petitioner here, and he relied upon the decisions in *Santo Teodoro* v. *Santo Teodoro* (*e*), *and Deck* v. *Deck* (*f*). In *Deck's Case* the parties were married in England, but the husband was domiciled in America, and had there committed bigamy, and the Court granted the wife a divorce. The ground of the decision, however, was that both parties were English, and therefore bound by the English divorce law, and the judgment was founded upon the obligation existing in every natural-born English subject of allegiance to the

(*c*) 2 Swa. & Tr. 67; 6 Jur. (N.S.) 561.
(*d*) 6 V.L.R. (I.) 113.
(*e*) 5 P.D. 79.
(*f*) 2 Swa. & Tr. 90.

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English Crown and obedience to the English law. Moreover, great stress was laid in that case, as in *Ho-a-Mie* v. *Ho-a-Mie*, upon the very wide words of 20 & 21 Vict., c. 85, which enabled "any wife" to present a petition. And the decision itself has been questioned by Brett, L.J., in *Niboyet's Case* (*g*). The facts, too, differ from the present, in that the wife there had always resided in England, and neither that case nor *Ho-a-Mie's Case*, I think, support the proposition that a wife, domiciled in another land and deserted by her husband there, can come here and acquire a domicil so as to come under sec. 74 of our *Marriage Act*. *Santo Teodoro's Case* is also not in point, in my opinion, for it seems to me a decision upon the particular facts. A divorce was granted there on the petition of the wife, the husband being a foreigner, but she had only married on the condition that she should always have her home in England, and should reside there six months in the year, and this condition had been observed. In the judgment, Sir R. J. Phillimore says, at p. 83: "The contract is made in England; there is a long cohabitation in England; the husband has been served;" but this must be taken in conjunction with the facts of the case; and I think it only amounts to a finding as a fact that the matrimonial domicil was in England, especially considering that the same learned judge decided, two years later, *Niboyet* v. *Niboyet* (*h*). There the wife was a British subject at the time of marriage, the husband being a Frenchman, and Sir R. J. Phillimore held that there was no jurisdiction. This was a considered judgment, in which the previous decisions are referred to, and there is no suggestion anywhere that the same point had been decided by the same judge within two years, and in addition he quotes a passage from *Firebrace* v. *Firebrace* (*i*), where Sir James Hannen states that: "The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must usually be sought in the place of that domicil." This shows, I think, the view held on this question by the judge who decided *Santo Teodoro's Case*, and although his decision in *Niboyet* v. *Niboyet* was reversed on appeal (*k*), Brett, L.J., dissenting, the appellate Court mainly went upon the words of 20 & 21 Vict., c. 85, like *Deck* v. *Deck* and

(*g*) 4 P.D., p. 18.
(*h*) 3 P.D. 52.
(*i*) 4 P.D., at p. 67.
(*k*) 4 P.D. 1.

Ho-a-Mie v. *Ho-a-Mie*, and Lord Selborne and Lord Blackburn have not given this appellate decision unqualified approval: See *Harvey* v. *Farnie* (*l*). Another case cited for the petitioner was *Simonin* (*falsely called Mallac*) v. *Mallac* (*m*), to which I have referred. But that was a suit for nullity of marriage, and it is pointed out in the judgment that if the marriage were valid the wife's domicil would not be English, her husband being a foreigner. The principal case, however, relied upon was *Le Sueur* v. *Le Sueur* (*n*), where the point is apparently expressly decided. In the judgment Sir R. J. Phillimore said, at p. 142: "Upon the whole I am disposed to assume, in favour of the petitioner, the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicil for herself, and in coming to that conclusion I am aware that I am going a step further than judicial decisions have as yet gone." But the cases of desertion which that learned judge was then deciding were evidently those suggested by Lord Cranworth in *Dolphin* v. *Robins* (*o*), of a husband abjuring the realm, deserting his wife, and establishing himself permanently in a foreign country, or committing felony and being transported (*p*), and such cases would be covered by the last clause of our 74th section. In the present case the husband deserted his wife in New South Wales, where they were then domiciled, and there seems to me to be no authority which decides that a wife in such circumstances is entitled to go to another land, and there acquire a domicil, so as to divorce her foreign husband. The decision of Brett, L.J., in *Niboyet* v. *Niboyet*, is directly opposed to such a view, for he says that "the court must be a court of the country in which the husband is at the time domiciled; because it is incontestable that the domicil of the wife, so long as she is a wife, is the domicil which her husband selects for himself, and at the time of the commencement of the suit she is *ex hypothesi* still a wife" (*q*). Although this was the dissenting judgment, the difference of opinion arose not on this question, but upon the interpretation of the English Act, and the reasoning upon which this judgment is founded, and the authorities

(*l*) 8 App. Cas. 43.
(*m*) 2 Swa. & Tr. 67.
(*n*) 1 P.D. 139.
(*o*) 7 H.L.C. 390.
(*p*) 1 P.D., at p. 141.
(*q*) 4 P.D., at p. 14.

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referred to in it, appear to me to show that this Court has no jurisdiction in the present case.

It is possible, if this objection could be cured and the wife could acquire domicil here, that the difficulty which caused the rejection of the petition in *Le Sueur* v. *Le Sueur*, viz., want of jurisdiction over the foreign husband, might be met by the express words of our Act. That point I need not consider, as I must dismiss the petition on the other ground.

The question in this case is an important one, and I should have referred it to the Full Court, only that the petitioner, to save expense, desired my decision, leaving her to appeal if she thinks proper.

Solicitor for petitioner: *Fay*.

A. J. A.

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August 18.

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TIPPING *v.* RICHELIEU.

Practice—Parties—Objection for want of parties—Time to take objection.

In an action by a remainderman against trustees of a will for breach of trust in handing over certain of the *corpus* of the property to the tenant for life, and improperly investing other portions of the property, the trustees, by their defence, alleged that the plaintiff had acquiesced in the breach of trust, and also raised the objection that the tenant for life was a necessary party. No steps were taken by either party as to adding the tenant for life as a party, and at the trial of the action, after the evidence for the plaintiff had been given, the defendants' counsel raised the objection that she was a necessary party.

Held, that she was a necessary party; but,

Held also, that the objection was taken at the wrong time, and that the defendants ought to have taken proceedings either by summons or motion before trial to have her added as a party, and should be mulcted in costs for leaving the objection till the last moment.

ACTION by Charlotte Mary Tipping, a residuary legatee under the will of Harker Brookes, deceased, against the executors and trustees, Robert Richelieu and Joseph Seddon, to recover moneys of the estate lost by their breach of trust, and for administration of the estate under the direction of the Court, and for accounts on the footing of wilful default.

By his will the testator, who died on the 15th September 1878, devised and bequeathed all his real and personal estate to the

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defendants upon trust for sale and conversion, and directed them to invest the proceeds thereof, after making certain payments thereout, in certain named securities, and to pay the income of such investments to his wife, Emma Brookes, during her life; and he gave the residue of his estate to his children. The plaintiff was the only surviving child of the testator, and by her statement of claim she alleged that the defendants had invested certain of the money of the estate in shares in a building society (not being one of the authorised securities), which had since gone into liquidation, whereby such money had been lost. She also alleged that the defendants, on the 6th June 1889, deposited 200*l.*, other portion of the trust moneys, in a bank, and on the 6th June 1890 had allowed the widow, Mrs. Brookes, to withdraw the same and apply it to her own use.

By their defence the defendants alleged that the plaintiff had acquiesced in the breaches of trust alleged, and took the objection that Mrs. Brookes was a necessary party to the action.

Higgins and *Stawell* for the plaintiff.

Neighbour for the defendants.

After the evidence for the plaintiff had been taken,

Neighbour, for the defendants, took an objection that Mrs. Brookes, the tenant for life, and the mother of the plaintiff, was a necessary party to the action—The evidence called for the plaintiff shows that Mrs. Brookes, as well as the plaintiff, has participated in the breach of trust. The defendants are entitled to be indemnified by her: *Daniell's Ch. Pr.* (6th ed.), 220, citing *Jesse* v. *Bennett* (*a*); *Lewin on Trusts* (8th ed.), 911.

[HOOD, J. The only question seems to me to be whether this is the proper time to take the objection. It is a grievous thing to allow the matter to come to trial, and then take an objection of this sort.]

The plaintiff had full notice of it, for the objection was expressly taken by the defence. She might then have added Mrs. Brookes

(*a*) 6 De G. M. & G. 609.

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as a party, but chose rather to go on and risk the objection being held to be a good one. As evidence was necessary to establish the objection, this is the proper time to take it: *Williams* v. *Sandy* (*b*); *Robertson* v. *Wealth of Nations G. M. Co.* (*c*).

Higgins and *Stawell* contra—It is submitted that the only contest between the plaintiff and the defendant is whether the plaintiff has acquiesced in the breaches of trust or not, and that that can be determined without the presence of Mrs. Brookes.

[HOOD, J. Must not the tenant for life be brought in at some time?]

We intend to ask that she should be served with the judgment, in order that she may be bound by the accounts under Order XVI., r. 40. In *Whitney* v. *Smith* (*d*) the tenant for life was not made a party, but was directed to be served with the order. It is also submitted that this objection ought to have been taken by summons in chambers, in order that the expense of the action might have been saved: *Sheehan* v. *Great Western Railway Co.* (*e*). It is for the defendants to apply to add Mrs. Brookes as a party if they think it is necessary for their protection: *Re Harrison* (*f*).

Neighbour in reply—The question of whether or not the plaintiff has acquiesced in the breaches of trust cannot now be determined so as to bind Mrs. Brookes in her absence. In *Williams* v. *Allen* (*g*), a similar case to the present, the objection was taken at the hearing, and the case was ordered to stand over for want of parties. It is for the plaintiff, who has the carriage of the proceedings, to see that the right parties are before the Court. We have followed the decisions of this Court in taking the objection, which is undoubtedly good at this time.

HOOD, J. The plaintiff in this case sues the defendants, alleging that they were executors and trustees of her father's will, that she was entitled, after the death of her mother, to certain property thereunder, and that the defendants have committed a breach

(*b*) 13 V.L.R. 368.
(*c*) 14 V.L.R. 585.
(*d*) L.R. 4 Ch. 513.
(*e*) 16 Ch. D., pp. 63, 64.
(*f*) [1891] 2 Ch. 349.
(*g*) 29 Beav. 292.

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of trust in handing over a portion of the property to her mother, and improperly investing other portions of it. The defendants say they committed these breaches of trust with the concurrence of the plaintiff, who consequently acquiesced therein. That is the issue which the parties come to try. The defendants then go on to state that they will object that Mrs. Brookes is a necessary party to this action. They say, in effect:—"You allege that we have paid money wrongfully to Mrs. Brookes. We allege that you have acquiesced in that payment, but we will stop the whole action when the matter comes on for trial—by objecting that Mrs. Brookes is a necessary party." Under the old system, at law and in equity, cases were continually being defeated by objections of this sort, and parties were put to inconceivable trouble. In my opinion the intention of the *Judicature Rules* was to remedy that injustice. Order XVI, r. 11, expressly states:—"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." That means that I can determine, as between the plaintiff and defendant, whether the plaintiff has acquiesced in the breaches of trust. So far I have no difficulty whatever; but the plaintiff wants administration as well, and the question I have now to consider is, as stated in the judgment of Mr. Justice Webb in one of the cases cited, *Williams* v. *Sandy* (*h*), whether on the case as it stands I can do substantial justice between the parties. The rule goes on to provide:—"The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties, whether as plaintiffs or as defendants, improperly joined be struck out; and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." That I think points to this, that, although I may go on and determine the matter in dispute between the parties, yet if I am unable to decide on all the questions

(*h*) 13 V.L.R., p. 371.

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involved without joining a certain person, that person ought to be added. I think that Mrs. Brookes is a necessary party, in order that I may ultimately decide the matters involved, and she must be joined. But I also think that this is not the proper time to take the objection. The defendants should have taken proceedings by summons to have Mrs. Brookes added as a party, or to stay the action. I shall therefore proceed to hear the case as to the acquiescence, and then adjourn the case to a day to be fixed, in order that Mrs. Brookes may be joined as a party. I will order the defendants to pay the costs of the adjournment, in the hope of discouraging all litigants from keeping an objection like this till the last moment.

Evidence on the question of acquiescence was then given for the defendants. In the course of the evidence it appeared that Mrs. Brookes was herself instructing counsel for the plaintiff. His Honor then said that on the evidence given, and from what had occurred, it was apparent that the whole action was brought at the instigation of Mrs. Brookes, and under the circumstances he would not make the order for adjournment, but would make the defendants pay the costs of adding Mrs. Brookes as a party, which he fixed at one guinea.

Solicitors for plaintiff: *Malleson, England & Stewart.*
Solicitors for defendants: *Wisewould, Gibbs & Wisewould.*

A. J. A.

IN RE JOHN LITTLE.

1892
August 25.
November 8.

Hodges, J.

Insolvency Act 1890 (*No.* 1102), *s.* 37—*Sequestration—Petitioning creditor's debt—"Secured debt"—Company—Shareholder—Power to deduct debts from dividend—Power to refuse transfer.*

A "secured debt," in sec. 37 of the *Insolvency Act* 1890 (No. 1102), means a debt in respect of which the creditor holds a security over the property of the debtor, which will continue to be held by him after sequestration of the debtor's estate, unless he does some act giving up the security.

A member of a company in liquidation was indebted to the company. By its articles of association power was given to the directors to deduct from the dividend payable to any member all moneys that might be due by him to the company, and also to decline to register a transfer of shares by any member indebted to the company. On order *nisi* obtained on the petition of the company for the sequestration of the member's estate.

Held, that the petitioning creditor's debt was not a "secured debt" within the meaning of sec. 37 of the *Insolvency Act* 1890.

ORDER *nisi* for the sequestration of the estate of John Little, on the petition of the Whittlesea Land Company Limited, a limited company being wound up voluntarily under the *Companies Act* 1890 (No. 1074).

The respondent was a member of the petitioning company, and he was indebted to the company. The petition stated that his debt was wholly unsecured, but objection was taken that it was a secured debt, inasmuch as under the articles of association of the company the directors might deduct from any dividend payable to a member all sums of money due to the company by him, and might refuse to register a transfer of his shares while so indebted.

Anderson, for the petitioner, moved the order absolute.

Geoghegan, for the respondent, showed cause—The respondent being indebted to the petitioning company, the company has a security over the shares of the respondent in accordance with the articles of association, which are binding on him as a member of the company. It is therefore submitted that the debt of the petitioning company is a "secured debt" within the meaning of sec. 37 of the *Insolvency Act* 1890 (No. 1102). The meaning of the term "secured debt" in the section was dealt with in *Re Whittles* (*a*). Failing to state in the petition and order *nisi* that

(*a*) *Ante*, p. 684.

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the petitioner held security for his debt, and to give an estimate of the value of the security, or to make an offer to give it up, is a good ground for discharging the order *nisi*: *Re McNamara* (*b*). The fact that, owing to the liquidation of the company, the shares may be of no value is not to be assumed, but, even if they were of no value, that should be stated in the petition and order *nisi*: *Re Harward* (*c*).

Anderson in reply—If the articles of association expressly provided that the company should have a lien on the shares of a member, it might have an equitable charge on them, as in *Re Lewis* (*d*); *Lindley on Companies* (5th ed.), 456-7. Here, however, the articles do not give a lien, the shares are held by the shareholder, and the only power of the company is to deduct any debts from the amount of a dividend before paying it, which amounts merely to a right of set off. No doubt the company under the articles may refuse to register a transfer of the shares, but the cases cited in *Lindley* show that that does not amount to a charge over them. Further, on sequestration of his estate, the rights and liabilities of the respondent on the shares will pass to his assignee, and the company can then have nothing which can be given up for the benefit of the creditors generally.

Cur. adv. vult.

November 8.

HODGES, J. This is a petition by the Whittlesea Land Company Limited, in liquidation, praying for the sequestration of the estate of John Little. The petitioning company is being voluntarily wound up. The respondent is a member of, and is indebted to, the company. The petition states that the petitioning company does not hold any security for the debt or for any part of it. The following of the company's articles of association were referred to in argument, viz.:—

"13. The directors may decline to register any transfer of shares made by a member who is indebted or under any liability to the company or to enter the name of the transferee in the register of members in respect of such shares.

"96. The directors may deduct from the dividend payable to any member all such sums of money as may be due by him to the company on account of calls or otherwise."

(*b*) 10 V.L.R. (I.) 84. (*c*) 4 V.L.R. (I.) 65. (*d*) L.R. 6 Ch. 818.

Upon these facts it is contended that the petitioning company is a secured creditor within the meaning of sec. 37 of the *Insolvency Act* 1890, and that consequently the order *nisi* should be discharged. I have not to determine what might be the effect of the provisions in the articles if the company were a going concern, but only whether, when the company is being wound up, and when the register of transfers and the payment of dividends within the meaning of the articles is at an end, they make the respondent's debt a secured debt within the meaning of sec. 37 of the Act. That section provides that the debt of the petitioning creditor "must not be a secured debt unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration, or unless the petitioner is willing to give an estimate of the value of his security." This language, in my opinion, indicates that a secured debt in this section means a debt in respect of which the petitioning creditor holds some security over the property of the respondent, which the petitioner can give up for the benefit of creditors: See *Re Whittles* (*e*); *Re Kennedy exparte Tatterson* (*f*). I think also that "security" in this section must mean something which such creditor retains, unless he does some act which amounts to a giving up;—something which the creditors generally do not and cannot get until such creditor gives it up. In my opinion, therefore, a "secured debt" in this section means a debt in respect of which the creditor has some security over the property of the debtor, which security will continue to be held by the creditor unless he does some act giving up the security.

If that be, as I think it is, the correct construction of sec. 37, I have to consider what security the petitioning company has which it can withhold from or give up for the benefit of the creditors generally. The respondent is a shareholder in the petitioning company. He has, I suppose, the scrip showing what shares he holds in the company, and because he is such shareholder he has an interest in the property of the company, and now that the company is being wound up it is his interest that the assets should be more than sufficient to pay the company's debts, and if there be a

(*e*) *Ante*, p. 684. (*f*) *Ante*, p. 688.

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Hodges, J.

surplus he has a right to share in it. On the other hand, he is liable to be called upon to pay the amount unpaid on his shares: See sec. 39 of the *Companies Act* 1890. But what security has the company which it can withhold from or give up to the creditors generally? The respondent has the shares in the petitioning company with the rights and liabilities, *inter alia*, above referred to. On sequestration the respondent's interest in the company will pass to the assignee for the benefit of creditors generally: See sec. 59 of the *Insolvency Act* 1890. It will pass without any "giving up" by the liquidator of the petitioning company. The petitioning company holds nothing which its liquidator can give up for the benefit of creditors of the respondent. Its liquidator cannot give up for the benefit of the creditors generally the respondent's interest in the company discharged from all liability for calls. It can only "give up" what the assignee had without any giving up—that is, it can only give up nothing—and, in my opinion, sec. 37 does not mean that a petitioner is "to be ready to give up" for the benefit of creditors generally that which the creditors get apart altogether from any giving up by the petitioning creditor. I do not think that the Statute means that the petitioning creditor is to be ready to give up nothing. I am, therefore, of opinion that the objection fails, and that the order *nisi* must be made absolute.

Solicitor for petitioner: *Hobday.*

Solicitors for respondent: *Tuthill, Geoghegan & Perry.*

A. J. A.

GEMMELL *v.* GEMMELL.

1892
November 30.
December 1.

Hodges, J.

"Intestates Act 1864" (*No.* 230)—*Will construction—Will made before Act—Death after Act—At what time construed—Alteration in law of succession—"By descent"—Husband acquiring interest in wife's property.*

Ten days before the "*Intestates Act* 1864" (No. 230) was passed, and thirty-eight before it came into operation, a testator devised real estate to the use of trustees in trust for his sister during her life, and subject thereto to the use of the person or persons who at her decease would be entitled thereto by descent in case she had died seized thereof in fee simple by purchase and intestate; and he bequeathed his personal estate to three other of his sisters and the survivors or survivor, but if none of them survived him he directed that his personal estate should be divisible amongst the next of kin of such three sisters living at the time of his decease (exclusive of any husband) in a course of distribution according to the Statutes.

The testator died about eighteen months after the coming into operation of the Act without having altered his will.

Held, that the testator and his advisers must be taken to have known of the alteration made in the law, and having left the will unaltered, must be considered as having intended it to take effect according to the new law, and that therefore the persons entitled to the real estate on the death of his first-named sister were her husband and children.

Held further, that the words "by descent" were to be taken as having been used in their technical sense, as signifying acquisition of property by operation of law as distinguished from acquisition of property by the act of the parties.

A husband now acquires an interest "by descent" in his wife's property on her death intestate.

ACTION to obtain a declaration as to who, on the construction of the will of Peter Fenwick, deceased, were entitled, on the death of his sister, Annie Gemmell, to his real estate, and for a partition of such real estate among the parties so held entitled.

The facts were the same as those in the previous action of *Gemmell* v. *Gemmell*, and will be found set out in the report *supra*, pp. 382-3.

After the decision in that case a fresh writ was issued by the same parties against the same defendant claiming a declaration as to the parties interested in the lands and a partition thereof.

Goldsmith for the plaintiffs—The meaning of the words "by descent" has to be found by reference to the law in force at the date of the testator's death and not at the date of making his will,

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Hodges, J.

for he is supposed to have known of the alteration of the law, and if he does not choose to alter his will accordingly, he is taken to mean that his will shall take effect according to the new law: *Hasluck* v. *Pedley* (*a*). At his death the parties entitled on the intestacy of Annie Gemmell would be her husband and children, and the persons entitled "by descent" would be the same people, or the words "by descent" could be treated as surplusage.

Higgins for the defendant—The words used by the testator with regard to the persons entitled to his real estate must be given some different meaning from those used with regard to his personal estate. As to the personal estate, he referred in terms to the persons entitled according to the *Statute of Distributions*, excluding husbands. Clearly he did not mean the same thing when he used different words as to the real estate, and the only distinction that can be drawn from the use of the distinct words is that he was referring to the person or persons entitled "by descent" from Annie Gemmell at the time the will was made—that is, the heir-at-law. The words "by descent" mean in a descending line, and do not include ancestors or persons who acquire title "by ascent;" and, even if they included those in an ascending line, they would not include a husband. In *Hasluck* v. *Pedley* the words used by the testator applied readily to the new state of law; but if the same rules were applied in this case, different words in two parts of the will would be made to mean the same thing, and the words "by descent" would be rendered mere surplusage or meaningless. The Court should endeavour to give effect to every part of the will, and should construe it according to the law of succession at its date: *In re Goodman's Trust Estate* (*b*). By the "*Intestates Act* 1864" (No. 230), sec. 4, the land would go not to the next of kin but to the administrator, and the next of kin would only be entitled through him. The administrator, and not the present plaintiffs, should therefore have brought this action.

Goldsmith in reply—The term "by descent" means the acquisition of property in any way by operation of law as distinguished

(*a*) L.R. 19 Eq., pp. 273-4. (*b*) 6 V L.R. Eq. 181.

from its acquisition by act of the parties: *Williams' Real and Personal Property* (3rd ed.), 451.

Cur. adv. vult.

HODGES, J. The question I am asked to determine is—What persons are entitled to certain property referred to in the will of one Peter Fenwick, deceased; whether the defendant is entitled to the whole of the property as heir-at-law, he being the eldest son of one Annie Gemmell in the will referred to, or whether the defendant and the other children of Annie Gemmell are entitled to the property in equal proportions, or whether the children of Annie Gemmell and her husband are entitled to it in equal proportions. The question turns upon the construction of a clause in the testator's will, which is in these words:—

"I devise all my freehold land and hereditaments wheresoever situate in the colony of Victoria, to the use of John Gordon, of etc., and William Lang, of etc., their executors, administrators, and assigns during the life of my sister Annie, the wife of William Gemmell, of Sandhurst, in the said colony, in trust for her separate and inalienable use during her life, and subject thereto to the use of the person or persons who, at my said sister Annie Gemmell's decease, would be entitled thereto by descent in case she had died seized thereof in fee simple by purchase and intestate, if more than one in equal shares as tenants in common, and his or their heirs or assigns for ever."

Now I propose to consider in the first place who are the persons indicated by that limitation, assuming that the will has to be construed according to the law as it now is, and, seeking to ascertain from those words the persons entitled, I should have to find the date of Annie Gemmell's death, and, having found that date, I should have to consider what persons at that time would be entitled thereto by descent had she been the purchaser of this property and died intestate. Apart altogether from any alteration of the law from the time of making the will to the time this is determined, there would be little difficulty in construing the will supposing the words "by descent" were left out. Being left out, it would be clear on the *Administration Act* that the husband and all the children would be the persons entitled. They would not be directly entitled, but the property would come to them through the administrator; they would be the persons beneficially entitled. Then arises the question whether the words "by descent" make any difference. It was contended by Mr. Higgins that those words

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"by descent" indicated that only persons lineally descended from Annie Gemmell could be entitled, and, to use his own expression, those words would not apply to any person who acquired title "by ascent not descent," as, for instance, a grandfather could not take from a grandson "by descent." He would take, according to his view, "by ascent." I know of no authority, nor has any been referred to, which draws any such distinction between title by descent and title by what Mr. Higgins calls "ascent." No doubt there may be an ascending line of ancestors and a descending line of descendants, but, as I understand the law, the property comes to individuals whether by the ascending line or descending line by what is known in law as "descent." It descends to them. Mr. Higgins used that argument for the purpose of showing that those words could not apply to the husband, as he was neither an ascendant nor a descendant, so that it could come to him neither by ascent nor descent. The word purchaser may, no doubt, be used in a variety of ways, but I think the words "by descent" and "by purchase" are to be taken in what may be called their technical signification. They are both used in the same sentence and both have a technical import, and I think Mr. Goldsmith was right when he said that "by descent" here meant the acquisition of property by operation of law as distinguished from the acquisition of property by the act or agreement of the parties, just as I think the word "purchase" means acquired by act or agreement of the parties as distinguished from the mere act of the law. That is the interpretation which should be put on the word "descent" here—that which comes to a person by the mere act of the law as distinguished from the act of the party. In considering, therefore, whether this property could come to a husband by the mere act of the law, and so be within the words "by descent," there is in *Williams on Real Property* one of the rules given, which I think shows clearly that property may be said to come from a wife to a husband by descent. At page 135 the 9th rule is given. It says:—

"A further rule of descent has now been introduced by a recent Statute, which enacts that where there shall be a total failure of heirs of the purchaser or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then, and in every such case the land shall descend, and the descent shall thenceforth be traced from the person last

entitled to the land as if he had been the purchaser thereof. This enactment provides for such a case as the following :—A purchaser of lands may die intestate leaving an only son and no other relations. On the death of the son intestate there will be a total failure of the heirs of the purchaser; and previously to this enactment the land would have escheated to the lord of the fee. But now, although there be no relations of the son on his father's side, yet he may have relations on the part of his mother, or his mother may herself be living; and these persons, who were before totally excluded, are now admitted in the order mentioned in the sixth rule."

That is, the heirs of the purchaser have totally failed, and the property shall descend to the purchaser's wife. If that can be said to be a title by descent from the purchaser to the purchaser's wife, I do not understand why it cannot be said to be a title by descent from a purchaser to that purchaser's husband. In my opinion these words, "by descent," here, should have that meaning given to them, and cover a devolution of property from a wife to her husband by operation of law. I think, therefore, looking at this document at the time at which it is to be construed, apart from any alteration of the law, it would indicate that the persons who are to take are the husband and the children of Annie Gemmell. There is no doubt that according to law they would take in different proportions, but I think, as Mr. Goldsmith pointed out, that the law and the will together indicate the persons who are to take, and then the will fixes the proportions in which they are to take, that is to say, in equal shares.

It was then suggested by Mr. Higgins that another meaning should be given to this document, because at the time this will was made this property would have gone to the heir-at-law. The will was made within a month or so of the time at which the law was altered, and the testator lived until after the law was altered, and, assuming the testator and his advisers to have known what the law was at the time of making the will, I think I may assume that they knew of the alteration of the law made at that very time and long before the testator's death. Notwithstanding that knowledge, he allowed the will to stand up to the time of his death unaltered, and I think I must take it that he meant his property to go to the persons to whom the law would give it at the time of his death, that is, the husband and children.

I shall therefore answer the question that has been put, by deciding that all the plaintiffs and the defendant, that is to say, the

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husband and children of Annie Gemmell, are entitled to the estate in equal proportions. I shall direct a sale in Chambers. Costs of proceedings up to this point to be paid out of the estate. Reserve liberty to apply and future costs.

Solicitors for plaintiffs: *Brahe & Gair.*

Solicitors for defendants: *Malleson, England & Stewart.*

A. J. A.

1892
June 16, 23.

A'Beckett, J.

IN THE WILL OF JOHN MURPHY, DECEASED.

Practice probate—Will—Execution—Attesting witness—Erasure of name of witness—Re-execution of will—Intention to revoke.

A testator duly signed his will in the presence of Thomas Considine and Ann Murphy, who duly signed their names as attesting witnesses. Ann Murphy was a daughter of the testator, and a beneficiary under the will. A few minutes after the will had been signed Mr. Croker, the testator's medical attendant, came into the room, and pointed out that Ann Murphy's being an attesting witness would disqualify her from taking any interest under the will, and suggested that it should be re-executed. The testator thereupon acknowledged his signature, and Mr. Croker, in his presence, and presumably with his approval, erased Ann Murphy's signature, leaving nothing more of it than a few illegible marks. He then signed his own name in the presence of the testator and of Mr. Considine, but Mr. Considine did not again sign as an attesting witness.

Held, that there was no valid re-execution of the will, as Mr. Considine did not re-sign as attesting witness.

Held also, that though the erasure of the name of one attesting witness would revoke the will if it was done with an intention of revoking it, yet where it was done with no such intention there was no revocation, and the will was accordingly admitted to probate as duly executed in the presence of Thomas Considine and Ann Murphy.

MOTION for probate of the will of John Murphy, deceased, or in the alternative for letters of administration of his estate.

Anderson in support of the motion.

Cur. adv. vult.

June 23.

A'BECKETT, J. The testator in this case duly signed his will in the presence of two persons, who duly signed their names as attesting witnesses. They were Thomas Considine, described in his affidavit as a Roman Catholic clergyman, and Ann Murphy,

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a daughter of the testator. By this will the testator devised and bequeathed all his property to his wife and children. Some few minutes after the will had been signed, Mr. Considine, having heard that Mr. Alfred Croker, the testator's medical attendant, was in the house, sent for him, and showed him the will. Seeing that it was made in favour of the testator's wife and children, one of whom was Ann Murphy, the attesting witness, and knowing that this would disqualify her from taking an interest under the will, Mr. Croker suggested that it should be re-executed. The testator thereupon acknowledged his signature, and Mr. Croker, in the presence of the testator, and presumably with his approval, erased the signature of Ann Murphy, leaving nothing more of it than a few illegible marks. He then signed his own name in the presence of the testator and of Mr. Considine. Mr. Considine, however, did not again sign the will as a witness, and therefore there was no valid re-execution of the will. I have to determine how far the validity of the document, which was at one time a good will, became affected by the erasure of the signature of Ann Murphy. There is no doubt that the erasure or cutting off of the signatures of the attesting witnesses, and, as I should say, the signature of one of the attesting witnesses, would revoke the will by the destruction of an essential part of the will if the erasure or cutting off were done with the intention of revoking the will: See *Evans* v. *Dallow* (*a*); *Birkhead* v. *Bowdoin* (*b*); *Hobbs* v. *Knight* (*c*). The intention to revoke is necessary to make the Act operative. In this case the intention was to re-execute the will, not to revoke it, and therefore there was no revocation. I admit the will to probate as duly signed in the presence of Thomas Considine and Ann Murphy as attesting witnesses.

The result of this decision will be that under sec. 13 of the *Wills Act* 1890 Ann Murphy, as attesting witness, has no legal right to any of the benefits given to her by the will. I assume that the other members of the family interested under the will do not wish to take advantage of this provision of the Act to frustrate the testator's intention. If I am right in this assumption, they would do well not to trust to their good intentions, which subsequent events might prevent their carrying out, and they should at once

(*a*) 31 L.J.P. 128. (*b*) 2 No. Cas. 66. (*c*) 1 Curt. 768.

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A'Beckett, J.

sign a document by which they would agree with the executors and with one another that Ann Murphy shall take the same benefit under the will as if she had not been an attesting witness. This, so far as they are concerned, will remedy the testator's mistake, and secure to Ann Murphy that which he intended her to have.

Solicitors: *Taylor, Buckland & Gates.*

A. J. A.

1892
Oct. 27.

A'Beckett, J.

IN RE JAMES ISAAC JOHNSON.

Insolvency Act 1890 (*No.* 1102), *s.* 37 (*viii.*)—*Order nisi—Act of insolvency—Failing to satisfy a judgment on demand—Reasonable time for satisfying.*

Where a debtor is called upon by a sheriff's officer to pay the amount of a judgment under sub-sec. viii. of sec. 37 of the *Insolvency Act* 1890 (No. 1102), and does not do so, a reasonable time must be allowed before presentation of a petition for sequestration of his estate, though the right to that time may perhaps be waived by the words or conduct of the respondent when the demand is made.

ORDER *nisi* for the sequestration of the estate of James Isaac Johnson, on the petition of John Cromie.

The petitioner was a judgment creditor of the respondent, and the act of insolvency alleged was that execution issued on the judgment was returned unsatisfied in whole, the debtor having been called upon to satisfy the judgment by the officer charged with the execution thereof, and having failed to do so.

Notice of several objections was filed, but the only material one was that a reasonable time was not allowed after the demand was made on the debtor to elapse before the petition was presented, it being on the same day.

Thomas Wood, sheriff's officer, produced the warrant and *fi. fa.* in the action of John Cromie, of Sale, against James Isaac Johnson, and deposed as follows:—"I saw the respondent on the 19th October at Westley & Demaine's office. Mr. Demaine was present. I said, 'I have a judgment against you. My name is Thomas Wood. I am an officer of the sheriff of the Central Bailiwick. Cromie, plaintiff, against Johnson, defendant, and that is you?' He said, 'Yes.' I said, 'The judgment is for (naming the amount in my warrant) and interest (reading from my warrant). Can you pay

me that money,' and put my hand out. He said, 'I will pay you at Sale.' I said, 'That will not do, I want the money now; can you pay me?' He said, 'No.' I said, 'Well, on failing to satisfy the judgment when called upon, it is an act of insolvency. I must tell you that the plaintiff intends to make you insolvent.' He said, 'I will get the money now. Come at three o'clock to Westley & Demaine's office.' I said, 'You must understand I have made a demand upon you, but I will come as a matter of courtesy.' I attended at Westley & Demaine's office at three o'clock, and waited till a quarter past. I did not see the respondent. I asked for him, and he was not there. I made no further demand on him."

Woolf for the petitioner moved the order absolute.

Weigall for the respondent showed cause—The evidence for the petitioner shows that the respondent did not refuse to satisfy, but on the contrary indicated his willingness and ability to do so if he could get to Sale. If a debtor is called upon under sub-sec. 8 of sec. 37 to pay, and says he cannot, no further time need be given; but if he says he can get the money, though he has not got it at the time, a reasonable time to get it must be allowed him: *Re Elkington* (*a*); *Re Merry* (*b*); *Re Douglas* (*c*).

[A'BECKETT, J. And *Re Hodgson* (*d*).]

Woolf in reply—All that is necessary under sub-sec. 8 is that the debtor should be called upon to satisfy, and should fail to do so.

[A'BECKETT, J. If it were necessary for a reasonable time to satisfy to elapse there was not a reasonable time allowed in this case. The writ of *fi. fa.* was returned unsatisfied the same day. But it seems to me that the proper course for a man sought to be made insolvent, wishing to escape the consequences of not at once satisfying, would be to have gone to the creditor and paid him after the writ was returned unsatisfied.]

Yes. Besides in this case the man's solicitor was present, and the debtor himself fixed the time when he would pay, viz., three o'clock, and at that time did not put in an appearance or ask for

(*a*) 13 A.L.T. 240.
(*b*) 13 V.L.R., pp. 202, 203.
(*c*) 12 V.L.R., p. 268.
(*d*) 5 A.J.R. 133.

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further time. The sheriff's officer was not to be expected to go to Sale, perhaps on a fool's errand, nor would he have any jurisdiction out of the Central Bailiwick.

A'BECKETT, J. This is a case of considerable importance as to the circumstances under which a creditor can proceed to compulsorily sequestrate his debtor's estate. The act of insolvency here is failing to satisfy a judgment—that execution issued on a judgment has been returned unsatisfied in whole or in part, the debtor having been called upon to satisfy such judgment by the officer charged with the execution thereof, and having failed to do so. The question here turns on this consideration, whether a person who has not been allowed a reasonable time to satisfy a judgment after demand can have his estate sequestrated; whether a person who has a demand made on him for immediate payment by the officer, and does not immediately comply, has then committed an act of insolvency upon which immediately the petitioning creditor can obtain and uphold an order for sequestration of his estate. There are two decisions of this Court which import into that ground of insolvency (sec. 37, sub-sec. 8) the condition that a reasonable time should be allowed to comply with the demand. I was at first inclined to think that it might be that this condition of a reasonable time was one only imported where the debtor had himself suggested some practical and near mode of satisfying the debt, and that it might be said only to arise where he had given some indication of his intention to pay the debt. But the terms of the judgment in *Hodgson's Case* (*e*) and in *Merry's Case* (*f*) I think show that this would be a mistaken view of the law as laid down by those cases. Assuming the debtor to be entitled to any time to meet a demand of this sort, the effect of granting an order *nisi* would be to prevent him from satisfying the debt where he otherwise might pay. The officer in this case holds out his hand, and requests cash for the amount of the debt to be put into his hand. The debtor may be unable to comply with that demand, and still have sufficient means to satisfy the debt. But if the petitioner's contention were correct, a creditor might immediately snap upon him an order for the sequestration of his estate, and treat that inability

(*e*) 5 A.J.R. 133. (*f*) 13 V.L.R. 193.

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at once to pay as entitling him to have the estate sequestrated. The Full Court has decided that this is not what the Act means. I can imagine cases in which under certain circumstances—where the debtor, so to speak, waives reasonable time, and says, "No, it is impossible; I have nothing; do what you like"—he may, by his conduct and words, make that short period reasonable, which under other circumstances would be unreasonable. The debtor in this case does nothing of that sort. He is described as a person resident at Sale in Gippsland. This demand is in Melbourne, and the observation he makes that Sale was the only place where the debt could be satisfied, and the conversation with reference to an appointment is quite inconsistent with waiver of the right to a reasonable time. So I do not think that the conversation between the debtor and the sheriff's officer cannot be relied upon as in favour of the petitioner. I do not rely on it either as in favour of the debtor. A person resident in Sale is met in Melbourne by an officer who holds out his hand and says, "I want the money now; will you pay me?" and the debtor says, "I cannot." I say that on such facts as those the petitioning creditor is not entitled to go within twenty-four hours to petition for the sequestration of the debtor's estate. The petitioner here has done that. He had no right to do it, and there is no reason whatever for withholding costs from the respondent. I discharge the order *nisi*, with costs.

Solicitors for petitioner: *Woolf & Destrée.*

Solicitors for respondent: *Westley & Demaine.*

A. J. A.

1892
Sept, 9, 15.

Hood, J.

LONG *v.* LONG.

Husband and wife—Marriage Act 1890 (*No.* 1166), *s.* 74—*Deserted wife—Husband residing in Victoria—Wife resorting to Victoria to obtain divorce—Husband's domicil—Wife's domicil.*

A deserted wife who resorts to Victoria (where her husband has resided for five years), with the object of obtaining a divorce, is debarred by sec. 74 of the *Marriage Act* 1890 (No. 1166) from obtaining relief, even though the husband has acquired a Victorian domicil.

PETITION by Edith Long for dissolution of her marriage with Charles Long, on the ground that he had, without just cause or excuse, wilfully deserted the petitioner, and without any such cause or excuse, left her continuously so deserted during three years and upwards.

H. Barrett for the petitioner.

No appearance for the respondent.

Cur. adv. vult.

HOOD, J. This was a petition by a wife against her husband for divorce on the ground of desertion for three years, based upon the provisions of sec. 74 of the *Marriage Act* 1890. The parties were married in South Australia, where they resided until 22nd January 1887, when the husband left his wife and came to Victoria, where he took up his abode and has lived ever since. The evidence satisfied me that the husband had deserted his wife, but I had great doubts as to the jurisdiction of this Court, and I therefore reserved my decision. The petitioner admitted that she was not resident here, and that she only came to Victoria a fortnight ago with the sole object of bringing this suit. It was contended that as the domicil of the wife was that of her husband, who had resided in Victoria for the past five years, the domicil of the wife was in Victoria. Whatever weight that argument might have is disposed of by the last words of sec. 74 of the *Marriage Act*. That being so, I have no jurisdiction to entertain this petition, and I must therefore dismiss it.

Solicitor for petitioner: *F. Barrett.*

A. J. A.

IN THE WILL OF ALEXANDER BISHOP (No. 2).

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Dec. 9, 12, 13, 20.

Probate jurisdiction—Jurisdiction to deal with caveats—15 *Vict., No.* 10—*Supreme Court Act* 1890 (*No.* 1142), *ss.* 20 *and* 21—*Administration and Probate Act* 1890 (*No.* 1060), *ss.* 19, 40, 41, *and* 43—*Sealing foreign probate—Preliminaries—Irregularity cured.*

In an application for sealing with the seal of the Supreme Court a copy of probate or letters of administration granted in the United Kingdom or any of the Australasian colonies the production, verification, and deposit of the documents mentioned in sec. 40 of the *Administration and Probate Act* 1890 (No. 1060) are conditions precedent to the valid sealing of the probate or letters of administration therein referred to, but neither they nor the payment of duty under sec. 43 are conditions of the jurisdiction of the Court to grant an order *nisi* where a caveat against the application has been lodged under sec. 41.

The jurisdiction of the Court is taken from the old ecclesiastical jurisdiction of the Court in England, and is conferred on it by the Act 15 Vict., No. 10, now the *Supreme Court Act* 1890 (No. 1142), secs. 20 and 21, under which caveats were one of the means by which objections to probates or letters of administration might be dealt with; and that method is recognised in Sir Redmond Barry's rules, made on the 1st February 1854, chap. 8, r. 9, and the present rules. Sec. 19 of the *Administration and Probate Act* 1890 amounts to an imperative direction to a person applying for an order *nisi* as to the materials that shall be placed before the Court in case a caveat has been lodged, but their absence, though it amounts to a grave irregularity, does not affect the Court's jurisdiction; and where their absence was not brought before the primary judge granting or dealing with the order *nisi*, and he made the order absolute, the Full Court, on appeal, where the objection as to their absence was taken, cured the irregularity by ordering that the seal of the Court be affixed to the probate upon all the formalities contained in the Act being complied with to the satisfaction of the Registrar of Probates.

APPEAL from an order of Hodges, J., made on the 6th September 1892, whereby he made absolute an order *nisi*, made on the 4th June 1891, for sealing with the seal of the Supreme Court probate, granted in Ireland, of the will of Alexander Bishop, deceased.

The application for the affixing of the seal of the Supreme Court was made by William Jardine, of Melbourne, the duly authorised attorney under power of John Bishop, of Ireland, one of the executors appointed by the will; and a caveat having been lodged against the application by Matthew Lang, Alexander Scott, and David Hood Valentine, an order *nisi* was then obtained by the applicant in these terms:—

"Upon motion this day made unto this Court by Mr. Kilpatrick, of counsel, for William Jardine, of Empire Buildings, Collins Street West, in the city of Melbourne, in the colony of Victoria, solicitor, the duly authorised attorney of John Bishop, of

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Ballymoran, Killinchy, County Down, Ireland, one of the executors named in and appointed by the last will and testament of the above-named Alexander Bishop, deceased; and upon reading the probate of the will of the above-named deceased, granted forth of the District Registry of Belfast, of the Probate and Matrimonial Division of the High Court of Justice in Ireland, to the said John Bishop; and upon reading the affidavits of the said William Jardine, sworn in this matter on the 27th day of May, 1891, and the exhibits therein referred to the affidavits of James Kitts, sworn on the 28th day of May 1891 and the 4th day of June 1891 respectively, and the exhibit marked "A" referred to in the affidavit of the said James Kitts, sworn on the 4th day of June 1891, being a copy of a caveat lodged by or on behalf of Matthew Lang, Alexander Scott, and David Hood Valentine, on the 31st day of January 1891, this Court doth order that the said Matthew Lang, Alexander Scott, and David Hood Valentine do on Thursday, the 18th day of June 1891, show cause to this Court why the seal of the Supreme Court of the colony of Victoria should not be affixed to the probate of the will of the said Alexander Bishop, and why the said Matthew Lang, Alexander Scott, and David Hood Valentine should not pay to the said William Jardine his costs of all proceedings occasioned by the filing of the said caveat and of this order."

The affidavits in the order *nisi* referred to did not state that verified copies of the probate granted in Ireland and the power of attorney had been filed, or that an affidavit that the power of attorney had not been revoked, had been made and deposited with the Registrar, or that no other caveat had been lodged, or that the duty payable to the Crown had been paid.

After dealing with the appeal on the merits,

Higgins and *Isaacs* for the appellant—It is submitted that the learned primary judge had no power to make the order *nisi* absolute. The order *nisi* recites the evidence on which it was made, and calls on the respondent to show cause why the seal should not be affixed to the probate, and the question is whether on the materials recited there was jurisdiction to make an order to affix the seal of the Court to this probate. The Act requires several matters to be done before the seal of the Court is affixed to a foreign probate. Where probate has been granted in Ireland, and there is property in this colony, power is given by sec. 40 of the *Administration and Probate Act* 1890. The executor, whether he be within the jurisdiction of this Court or not, may either personally or by some proctor on his behalf produce the same to the Registrar, and file a verified copy thereof in his office, or any person, duly authorised by power of attorney under the hand and seal of the executor, may either personally or by some proctor

on his behalf produce such probate and power of attorney, accompanied by an affidavit that such power of attorney has not been revoked, to the Registrar, and may file verified copies thereof in his office. When such documents have been produced, and verified copies thereof so deposited, by or on behalf of such executor or person so authorised by power of attorney, such probate shall be sealed with the seal of the Supreme Court of Victoria. Then by sec. 41 a caveat may be lodged, which is to be dealt with in the same manner as if it were against granting probate. By sec. 42 the seal is not to be affixed, unless the intention to apply for it to be affixed has been advertised, and an affidavit filed stating that it was advertised fourteen days before the making of the affidavit, and by sec. 43 it is not to be affixed till duty has been paid. In this case the materials on which the order *nisi* was made, and also the order absolute, did not include evidence that verified copies of the probate, power of attorney, and affidavit of no revocation, had been deposited with the Registrar, nor was there any proof that no other caveat had been lodged, nor any proof that the duty had been paid.

[HIGINBOTHAM, C.J. Those are conditions, if they be conditions at all, not of the power of the Court to order the seal to be affixed, but of its being affixed. I happen to know from another argument that the seal has not yet been affixed. They are essentials to affixing the seal, but not to the jurisdiction to order it to be affixed.]

It is submitted that these matters are necessary to give the Court jurisdiction.

[HOLROYD, J. If good, it would only necessitate the varying of the order, by saying that the order *nisi* should be made absolute on producing these materials; that the seal should be affixed as soon as these documents were filed.]

It is submitted that the Court has no power given to it by the Act to make any order until the conditions imposed by the Act have been complied with.

[HIGINBOTHAM, C.J. Sec. 42 has been regarded up to the present time as dealing with the application to the Registrar, not with that to the Court. If you had an affidavit showing that copies of the probate and power of attorney had not been filed you would be in a better position.]

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The order recites the materials on which it is made, and these are not included.

[*Purves*—As a matter of fact, I am told that the original of the probate and the power of attorney were verified and deposited.

HOLROYD, J. Is not the original as good as a copy?]

The Act requires that verified copies shall be deposited—of course for future use and reference in the office. The originals would be withdrawn when the seal was affixed.

[HIGINBOTHAM, C.J. Has an application to seal been yet made in this case? The materials required by the Act are only necessary for the tribunal to which application to seal has been made. The order *nisi* only calls on some one to say why the seal should not be affixed.]

It is an order that the seal be affixed unless he shows good cause against it.

Purves, Q.C., *Topp* and *Kilpatrick* for the respondents were not called on by the Court on the questions raised by the caveat, but only on the question of jurisdiction—The caveators never raised this objection in the Court below, and it is submitted that they should not be allowed to rely on it now. The Registrar alone is the person who has to deal with the sealing of foreign probates.

[HIGINBOTHAM, C.J. You assume that, but I am by no means clear that it is so. I do not think it is by any means clear that these applications are to be made to the Registrar.]

Sec. 41, which draws in the old procedure, etc., under sec. 19, can only have a very limited application on one of these motions, because there is this distinction—in the one case you go to the Registrar, where the caveat is lodged; in the other to the Court. The words, "shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the granting of probate," cannot be read literally; they mean only that it is a bar to the application. Where there is no caveat, it is submitted that it is clear from all the sections that the application to have the seal affixed is to be made to the Registrar.

[HOLROYD, J. Before the Court makes an order *nisi* ought not there to be an affidavit or oral evidence upon which, if there had

been no caveat, the seal would be affixed? The difficulty I feel is that it seems as if the power to order the seal to be affixed does not arise till this has been done.]

We have, since this hearing commenced, filed the verified copies and all necessary materials. When application is made to the Registrar the depositing of copies is a matter for him to deal with. The caveat only is a bar to his proceeding, and the application then made to the Court is merely made to sweep away that caveat. The Registrar before sealing would still require the necessary materials.

[HIGINBOTHAM, C.J. The Registrar has, in fact, no power whatever to affix the seal. It is in the custody of the Chief Justice. It may be that the seal should not be actually fixed until the Registrar, if he has authority to deal with these things, certifies to the custodian of the seal that these preliminaries have been complied with, and that the duty has been paid.]

Yes, it is a mere matter of procedure. The Court has general jurisdiction. 15 Vict., No. 10, gave the Court all the ecclesiastical jurisdiction of the English Courts, and there is nothing in these later Acts to take away that jurisdiction.

[HOLROYD, J. Fixing the seal of the Supreme Court to a foreign probate is equivalent to the issuing of probate, and "the seal of the Supreme Court shall not be affixed" is equivalent to "probate shall not be issued" in the ordinary case.]

The Court would undoubtedly have power to order the seal to be affixed, subject to the filing of additional materials, as in the ordinary grant of probate. *In the Estate of Severne* (*a*) administration was granted conditionally on an exemplification of administration being filed.

Higgins in reply—There was no jurisdiction under the old ecclesiastical practice to seal a foreign probate, and the only jurisdiction that the Court has in the matter is that given by this Act.

[HOOD, J. If sec. 19 were not there, and the other sections were, could not the Court, if satisfied with the materials, grant an order *nisi* to remove the caveat?

(*a*) 6 V.L.R. I. 1.

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HOLROYD, J. Why could not the Court, without any express provision, get rid of a caveat?]

Unless the Act has given some operation to a caveat it would have none. If it has done so, it can only be got rid of as the Act provides.

[HOLROYD, J. The same thing was done in the old ecclesiastical jurisdiction conferred on this Court.]

15 Vict., No. 10, was passed in 1852 before similar powers were given in England by the Acts 20 and 21 Vict., chap. 79, sec. 95, and 21 and 22 Vict., chap. 56, secs. 12 to 14.]

[HIGINBOTHAM, C.J. No doubt the seal cannot be affixed until all the matters required by the Act are done.]

Then the Court should not order it to be done until the Act is complied with. Sec. 19 is the only section that prescribes how a caveat is to be dealt with, and it is to that section obviously that sec. 41 applies. The applicants have dealt with the present caveat under sec. 19, and asked for an order *nisi*, and the whole question is whether an order *nisi* granted under that section is good where the rest of the Act has not been complied with. *In the Estate of Austin* (*b*) order *nisi* shows that the objection that the materials on which an was granted are insufficient may be taken on the return of the order.

[HOOD, J. The learned judge there deals with the want of materials as a condition that may be waived.

HIGINBOTHAM, C.J. Your argument on sec. 40 may be taken as conceded to the extent that it is necessary for these things to be produced before the seal is attached. But you have to deal with sec. 19—are these conditions to the jurisdiction?

Where the Act directs something that by its very nature must be subsequent to the order for sealing?—I mean the payment of duty—I do not see how it is a matter of jurisdiction to granting an order *nisi*, or making it absolute.]

We are asked to show cause why the seal should not be affixed, and we show that the Act has not been complied with. Under these circumstances the order ought not to be made absolute.

[HOLROYD, J. They have proceeded in a very irregular way, and if you had taken the objection at the outset of the hearing below you might have got the order *nisi* discharged, but we have power to set it all straight.]

(*b*) 1 V.L.R. I. 38.

We are entitled to show at any time that the materials are insufficient. At the most our not taking objection below should go to costs. The ecclesiastical practice was the same as it is now: *Tristram and Coote's Probate Practice* (10th ed.), 333, etc.; *Coote's Ecclesiastical Law* (ed. of 1847), 440.

HIGINBOTHAM, C.J. We think this appeal has failed on all grounds. This is an appeal from an order of Mr. Justice Hodges, made on the 6th September last, by which he made absolute an order *nisi* made on the 4th June 1891, for sealing with the seal of this Court probate, granted in Ireland, of the will of Alexander Bishop, deceased, dated the 15th October 1890.

The testator died in Ireland about a month after the execution of the will, on the 10th November 1890, at the house of his brother, John Bishop, who is made by the will one of the executors, and who is sole beneficiary under the will. The testator was resident for many years in this colony, where he met with different degrees of good and ill fortune, and during the latter years of his residence here he was successful in his business. He made several wills prior to the one in dispute, and by each of them he disposed of his property in somewhat similar terms. By each of them he divided it into six parts, and by each of them he gave one part to each of his brothers, Thomas and John, and also one part to his nephew, Thomas H. Henderson, who had been engaged by him in his business of licensee of refreshment rooms, and to whom he felt a certain amount of indebtedness for his services. Each of these persons was left a beneficiary to the extent of one-sixth by the last colonial will. By that will he also recognised the assistance which he had received from his friends, and he left shares to a member of each of the families of Mr. Lang and Mr. Valentine. In the early part of 1890 the testator went to England, and he appears to have left his friends and relatives here under the impression that they were to rely on a certain benefit under the wills he had made. He also appears to have left them under the impression that he was not on friendly terms with his brother John, or, at all events, that he had a greater regard for his brother Thomas than he had for John. However, he had by his last colonial will made equal provision for both brothers. He left Victoria in March 1890, and was not at

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home very long before he died. He appears to have given way to habits of drinking after reaching home. According to some of the evidence, he had also been in the habit of drinking before he left Victoria, but in any event he appears after reaching home to have given way to this habit to a greater extent. Immediately after his arrival in Ireland in April 1890, he proceeded to his brother John's house in County Down, and remained there until his death in November 1890. His beneficiaries under the last Victorian will are naturally disappointed at finding that he made a will by which he had taken away the shares which they expected to derive, and they now impeach the Irish will on several grounds. They say that this will of the 15th October 1890 is a forgery. They say that the testator was not at the time he executed it possessed of testamentary capacity. They also charge his brother, John Bishop, with having obtained the execution of it by the exercise of undue influence. It is also alleged that this will was not duly executed. The learned primary judge has found upon all the objections in favour of the will, and we are of opinion that these findings are right and ought not to be disturbed. [His Honor then dealt at length with the evidence, after which he proceeded as follows:]—In addition to those grounds of objection, an entirely different argument has been raised before us, directed to the point that this order absolute and the order *nisi* upon which it was founded are without jurisdiction—that is to say, that the Court had no jurisdiction to make either the one or the other. That argument was founded upon the suggestion that no proof is to be found in the evidence in this case that verified copies of the probate and power of attorney have been deposited with the Registrar of Probates, and also that there is no proof that the duty has been paid. It appears to be conceded by the other side that that suggestion is well founded, and that in point of fact copies of these documents have not been lodged, nor has the duty been paid up to this time. It is contended for the caveators that these are defects which constitute want of jurisdiction in the Court to make the order *nisi* on which the decision appealed from is based. Sec. 40 of the *Administration and Probate Act* 1890 provides—

"When probate of the will or letters of administration to the estate of any deceased person who has left any property, whether real or personal, within Victoria,

has or have been granted by any court of competent jurisdiction in the United Kingdom, or any of the Australasian colonies,

"The executor or administrator therein named, whether he be within the jurisdiction of the Supreme Court of Victoria or not, may either personally or by some proctor on his behalf produce the same to the registrar, and file a verified copy thereof in his office; or any person duly authorised by power of attorney under the hand and seal of such executor or administrator, may either personally or by some person on his behalf produce such probate or letters of administration and power of attorney, accompanied by an affidavit that such power of attorney has not been revoked, to the registrar, and may file verified copies thereof in his office."

The section then proceeds—

"Where such documents have been produced, and verified copies thereof deposited as aforesaid by or on behalf of such executor or administrator or person so authorised by power of attorney, such probate or letters of administration shall be sealed with the seal of the Supreme Court of Victoria, and shall have the like force and effect and the same operation in Victoria as if it or they had been originally granted in Victoria."

It has been contended then that the production and deposit of these documents are conditions precedent to the jurisdiction of the Court to order that its seal be affixed to the foreign probate. Now the production, verification, and deposit of these documents are undoubtedly conditions precedent to the valid sealing by the Court of probate or letters of administration. We think that that is clearly the effect of the Act and of this section. But it is a different question whether the verification and deposit of such documents, or the payment of duty, are conditions of jurisdiction to grant an order *nisi* after a caveat has been lodged. It has been contended under sec. 19 of the Act that it constitutes such conditions conditions of jurisdiction. Sec. 19 provides:—

"In every case in which a caveat shall be lodged the Court may, upon motion on behalf of the person applying for probate or administration, supported by affidavits upon which, if there had been no caveat, probate or administration would have been granted, make an order *nisi* for the grant of probate or administration to the person applying, and every such order shall name a time for showing cause against the same, and the Court may enlarge such order from time to time."

We do not think that sec. 19 is the section under which the Court derives its jurisdiction to deal with caveats which may be lodged. The jurisdiction of the Court to award probate or letters of administration is conferred by the 20th and 21st sections of the *Supreme Court Act* 1890, which are taken from the 15th and 16th

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sections of the old *Supreme Court Act*, 15 Vict., No. 10. Sec. 19 of the *Administration and Probate Act* 1890 prescribes the method upon which the Court shall act in dealing with caveats, and it undoubtedly directs that the application for such rule *nisi* must be supported by such affidavits as, if there had been no caveat, would have justified a grant of probate or letters of administration. The neglect to deposit verified copies of the power of attorney and probate constitutes, in our opinion, a very grave irregularity, but nothing more. It does not deprive the Court of jurisdiction to deal with the application for the order *nisi* or of jurisdiction to amend and correct, as it may deem proper, the effect of the neglect to deposit verified copies of these documents. The jurisdiction of the Court is taken from the old ecclesiastical jurisdiction of the court in England, and is conferred on the Court in the largest way by the *Supreme Court Act*, 15 Vict., No. 10. Under the ecclesiastical law in England caveats were one of the methods by which objection might be taken to the grant of probate or letters of administration, and secs. 20 and 21 of the *Supreme Court Act* recognise the existence of the power in the Court to use this particular method in dealing with objections to the grant of probate or letters of administration. The use of caveats as one of such means is also recognised in the very first rules of the Court. The ecclesiastical rules, known as Sir Redmond Barry's rules, made on the 1st day of February 1854, chap. 8, contain the ecclesiastical rules, and rule 9 deals with proceedings in cases where caveats have been lodged. The present rules also deal with caveats. This section of the *Administration and Probate Act* 1890 amounts, in our opinion, to no more than an imperative direction as to the materials that shall be placed before the Court in case of the use of this means of caveat, a direction which ought to have been complied with, but which amounts to no more than a direction as to what shall be done where a party applies for a rule *nisi*. Now, in this case, verified copies of these documents have not been deposited, and the absence of their deposit was not brought before the learned judge who granted the rule *nisi*, nor before the learned judge who dealt with the rule and made it absolute, and the question is now raised for the first time, and we think that we have power to correct this irregularity, and prevent it from causing a total failure of all the

proceedings hitherto taken in the course of the application for this probate. As to the form of this judgment we shall reserve our decision, but subject thereto we are prepared to give our decision. The appeal will be dismissed with costs. The order of the learned primary judge will be affirmed. We order that the seal of the Supreme Court of Victoria be affixed to the probate of the will of Alexander Bishop upon the deposit with the Registrar of Probates of copies of the probate and power of attorney, verified by affidavit or otherwise, to the satisfaction of the Registrar, and upon payment of the duty. We will consider the form of the order.

HOLROYD, J. I agree generally in the judgment and observations of the learned Chief Justice. Without going into details, I would say that the evidence of the due execution of this will by the testator, and of his mental competency, seems to me more trustworthy than that which throws doubt on these points, and I should have come to the same conclusion as the learned judge below. The evidence of undue influence, fraud, and forgery is wholly insufficient, although some of the circumstances shown lead to a suspicion of undue influence. Adverting to the main point of law raised in this case, sec. 19 of the *Administration and Probate Act* 1890 provides the means by which caveats may be disposed of, but the jurisdiction to dispose of them existed previously. In my opinion it was grave irregularity to obtain the order *nisi* without having first filed verified copies of the probate and power of attorney; and, if the objection had been raised before the learned judge below, he might have thought it a sufficient ground for discharging the order *nisi*, but the learned judge was permitted to make the order absolute without having had this objection raised. If the learned judge had no jurisdiction to make the order *nisi* without verified copies of these documents having first been filed, then the order was null and void, and there was no order which could be made absolute. But I cannot think that by sec. 19 of the *Administration and Probate Act* 1890 it was intended to cut down the jurisdiction of the Court, and I think the Court can cure this irregularity and make the order that the seal of the Court be affixed to this probate, subject to all the conditions being complied with before the order is acted upon.

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HOOD, J. I concur in the judgment delivered.

Dec. 20.

HIGINBOTHAM, C.J. The order in this case will be that the seal of the Supreme Court be affixed to the probate, upon all the formalities contained in the Act being complied with to the satisfaction of the Registrar.

Solicitor for the appellants: *Manton.*
Solicitors for the respondents: *Lawson & Jardine.*

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ground that the company registered was not the company he had agreed to join, which was a company to purchase this particular piece of land only. On action brought by the company for such instalments:—*Held*, that the solicitor was the agent of the defendant, among others, to draw up the memorandum and articles of association, that it was the defendant's duty to see, within a reasonable time, that the agent had not exceeded his authority, and that he had allowed an unreasonable time to go by without objection, and was therefore liable. THE OSBORNE PARK LAND AND INVESTMENT COMPANY LIMITED *v.* PEGG [515

2. —— *Directors—Promissory note—Signatures of directors—Personal liability—Knowledge of payee of note—Equitable defence.*] Where directors of a limited liability company gave two promissory notes on behalf of the company, but signed them with their own names, not as directors of the company, and the payees of the notes took them as binding on the company, and did not suppose that the directors were in any way personally responsible on them, the Court, on action by the payees against the directors personally after the liquidation of the company, thinking it would be inequitable to allow them to take advantage of the mistake made by the defendants in their mode of signature, refused them relief. DICKENS & CO. *v.* INGRAM - - 675

3. —— *Foreign company—Proof of incorporation—Contract to deliver publication of work in parts—Reasonable time—"Federal Council Act* 1886."] Evidence showing that a company carries on business as a company in New South Wales and Victoria, and has offices in both colonies, is *prima facie* proof of the due incorporation of the company in New South Wales, and the company is entitled to sue in Victoria. The "*Federal Council Act* 1886," enabling the Court to take judicial notice of signatures of certain officials therein mentioned, does not apply to officials in the Colony of New South Wales, and does not enable the Court to receive in evidence certified copies of documents signed by such officials on their mere production. The plaintiffs entered into a contract to deliver to the defendant a certain work containing forty-two parts, at a price of 5*s.* for each part. One of the conditions of the contract was that non-delivery of the publication at any specified date should not release the defendant from his obligation to take the work. The plaintiffs undertook to begin the delivery of the work in 1886 or the following year, and to complete the delivery of the series as soon after publication as possible, and they pledged themselves to a faithful performance of this part of the agreement. The contract was signed in November 1885. The first part was delivered to and paid for by the defendant on the 6th May 1887. The second part was tendered to the defendant in

COMPANY—*continued.*

April 1888, and he refused to take it, and in March 1890 the whole of the remaining parts were tendered to the defendant, and he refused to take them. It appeared that the second part was ready for delivery in March 1887, that the parts up to No. 20 were ready in December 1887, and from No. 20 to No. 30 in December 1888, and the remaining parts in November 1889. The plaintiffs sued the defendant for the price of the remaining forty-one parts:—*Held*, that the contract required the plaintiffs to deliver the various parts of the work within a reasonable time, and that the plaintiffs did not fulfil their part of the contract by delivering the various parts of the work as set out above, and that therefore they were not entitled to recover. THE PICTURESQUE ATLAS CO. LIMITED *v.* SEARLE - - - 633

4. —— *Provisional directors, misrepresentation by—Prospectus, misrepresentation by—Misrepresentation—Concealment of vendor—Action by company for calls—Defence—Action by shareholder for relief—Delay—Laches—Winding up.*] Misrepresentation by provisional directors advising persons to apply for shares in a company about to be formed who pose as disinterested advisers, and conceal the fact that they are the vendors of land which the company is being formed to purchase, is no answer to an action by the company for calls, nor any ground of action against the company itself, though it may be against the provisional directors deceiving them. Misrepresentation in the prospectus of a company which did not disclose the fact that the persons therein described as provisional directors were, with one or two exceptions, vendors to the proposed company, though it might be ground for rescinding the contract of purchase, if action had been promptly taken by the company on discovering that the provisional directors were the vendors, is no ground of defence by a shareholder to an action for calls, nor any ground for claiming relief against the company. Misrepresentations in the prospectus of a company as to the advantages and value of a property offered for sale to the company when formed, in order to form a ground of relief by shareholders, must have operated as material inducements to them to take shares, but even if material, the right to relief will be lost if their actions are not brought before the liquidation of the company, and may be lost prior to liquidation by their conduct before complaining and delay in complaining, if it has induced other innocent shareholders and creditors to alter their position. WHITTLESEA LAND COMPANY *v.* GUTHRIE, AND GRIFFITHS *v.* WHITTLESEA LAND COMPANY 557

5. —— *Rectification of register—Companies Act* 1890 (*No.* 1074) *s.* 36—*Transfer of shares—Execution of transfer by transferor and transferee — Discretion of directors to assent to transfer—Acts of secretary not binding on company—Jurisdiction of Court to assent to transfer*

after liquidation.] H. sold shares through B., the secretary of a company, to C., in March 1890. B. acted as H.'s broker in this transaction. H. executed the transfer and lodged the same with B., requesting him to secure the execution of the transfer by C. The articles of association of the company provided that transfers must be signed by both transferror and transferree, and that the directors might decline to register any transfer without assigning any reason therefor. C. was a director of the company during the year 1890, and up to the time of the company going into liquidation. After March 1890 no notices were ever sent to H., but notices of calls in respect of these shares were sent to C., and C. paid all the calls. During the year 1891 H. discovered that his name was still on the register and that C.'s name was written in pencil on the register. H. took no steps in the matter until, in the middle of the year 1891, a notice of call was sent to him and he thereupon called on B., the secretary, and asked for an explanation, and B. said that it was a mistake, and that the notices were being and would continue to be sent to C., who had purchased the shares. No other notices were sent to H. until the beginning of 1892, when, upon receiving a notice of a call, H. wrote to the directors of the company stating that he had sold the shares and asking to have his name removed from the register. The directors refused to remove his name from the register. The company soon afterwards went into liquidation and H.'s name was placed upon the list of contributories. Upon an application by H. to have his name removed from the list of contributories:—*Held*, that it was the duty of H., as transferror, to see that his name was removed from the register, and that the company were not bound by the act of the secretary in sending notices to C., and that the company had not accepted C. as a member in respect of these shares, and there being no negligence or default on the part of the company, H. was rightly placed upon the list of contributories. Upon a further application by H. to have the register rectified by removing his name from the register and substituting the name of C. as shareholder:—*Held*, that the directors having the power to decline to accept a transfer, the Court had no jurisdiction after the company had gone into liquidation to exercise the discretion which rested with the directors. IN RE THE CHATSWORTH ESTATE COMPANY LIMITED. IN RE CLARKE, EXPARTE HARTNELL - - - 442

6. —— *Rectification of register—Shares held in trust until transfer—Transfer of shares by trustee.*] M., an accountant in The Real Estate Bank, took a transfer of shares in The Chatsworth Estate Company, and became registered as holder in respect of such shares. A deed was executed between M. and The Real Estate Bank, whereby it was declared that M. should hold the shares subject to the direction of the bank, and

should transfer them as required by the bank, and until such transfer should stand possessed of the shares in trust for the bank; the bank undertook to indemnify M. against all losses. Subsequently, after the execution of the deed, M. transferred the shares at the direction of the bank to some nominee of the bank, whose name did not appear. The Chatsworth Estate Company went into liquidation. M. then applied to have the register of the company rectified by removing his name and substituting the name of the bank therefor:—*Held*, that as soon as the shares had been transferred by M. at the request of the bank, his duties as trustee ceased, and that he was entitled to have the register rectified. IN RE CHATSWORTH ESTATE COMPANY, EXPARTE MARRIOTT - - 400

7. —— *Security for costs—Companies Act* 1890 (*No.* 1074), *s.* 68—*Security for costs where company in course of voluntary liquidation.*] Sec. 68 of the *Companies Act* 1890 applies to companies in the course of voluntary liquidation, and therefore, under that section, a judge has discretionary power to order a company in course of voluntary liquidation, when plaintiff, to give security for costs to a defendant in the event of the latter's success. VICTORIAN MORTGAGE AND DEPOSIT BANK LIMITED *v.* AUSTRALIAN FINANCIAL AGENCY AND GUARANTEE COMPANY LIMITED AND LUCAS - - - - - - - 754

8. —— *Suit by shareholder on behalf of himself and other shareholders—Transactions entered into with strangers — Ultra vires — Parties—Form of suit.*] Where an individual shareholder in a limited company sues on behalf of himself and all other shareholders in the company, except the defendants, the directors of the company and the company, to have it declared that certain transactions entered into between the company and other persons were *ultra vires* of the directors and therefore void, and seeking to make the directors personally refund the loss sustained by the company thereon, such other persons are necessary parties to the action. In the absence of any special circumstances, such as if it is not possible to get the company to sue, or if the majority of the shareholders in the company are against taking proceedings, the company (in liquidation) is the only proper plaintiff to sue the directors to recover money of the company expended in transactions which were *ultra vires* of the directors. An action for such purpose by a shareholder on behalf of himself and all other shareholders except the directors, making the company a defendant, cannot be maintained in the absence of special circumstances. NANKIVELL *v.* BENJAMIN - - - - - - - 543

9. —— *Winding up—Companies Act* 1890 (*No.* 1074), *sec.* 154—*Rules—Payment through Court to liquidator of moneys due to different shareholders by one cheque.*] A judge has no jurisdiction to authorise his associate to countersign

Rule 4 of the rules under the *Insolvency Act* 1890 only applies to the computation of time in cases where such time is prescribed by the rules, or by the practice of the Court, and not to cases where the time is fixed by the Act itself. By sec. 37, sub-sec. (v.), it is provided that a petition for sequestration under that section must be presented within twelve days from the seizure. The seizure was made on 30th August, and the petition was presented on Monday, 12th September:—*Held*, that the petition was not presented within the time limited by sec. 37, sub-sec. (v.). IN RE ——— - - - - - - - - 570

6. ——— *"Secured debt"—Act No.* 1102, *ss.* 37, 67 (v.), *and* 122—*Security over estate of respondent—Transfer to assignee—Guarantee of third person.*] A "secured debt" in sec. 37 of the *Insolvency Act* 1890 (No. 1102) means a debt for which the petitioner has security over the debtor's estate, capable of being handed over to the assignee or trustee for the benefit of all creditors on the estate being made insolvent. A guarantee for a debt given to the petitioner by a third person is not a security for the debt within the meaning of the section. IN RE WHITTLES [684

7. ——— *"Secured debt"—Act No.* 1102, *s.* 37—*Sequestration—Petitioning creditor's debt—Company—Shareholder—Power to deduct debts from dividend—Power to refuse transfer.*] A "secured debt," in sec. 37 of the *Insolvency Act* 1890 (No. 1102), means a debt in respect of which the creditor holds a security over the property of the debtor, which will continue to be held by him after sequestration of the debtor's estate, unless he does some act giving up the security. A member of a company in liquidation was indebted to the company. By its articles of association power was given to the directors to deduct from the dividend payable to any member all moneys that might be due by him to the company, and also to decline to register a transfer of shares by any member indebted to the company. On order *nisi* obtained on the petition of the company for the sequestration of the member's estate:—*Held*, that the petitioning creditor's debt was not a "secured debt" within the meaning of sec. 37 of the *Insolvency Act* 1890. IN RE LITTLE - - 777

8. ——— *Security for debt—Act No.* 1102, *s.* 37 (v.)—*Petition for sequestration—Act of insolvency—Execution levied by seizure—Valuation of security.*] Where execution issued against a debtor on a judgment recovered by a creditor has been levied by seizure, the creditor has a security for his debt; but, inasmuch as the property levied upon passes to the assignee or trustee of the debtor's estate upon adjudication of sequestration, the creditor, in petitioning for the sequestration of his debtor's estate on the ground that such process has not been *bonâ fide* satisfied within four days of seizure, need not state in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration, or give an estimate of the value of his security. IN RE KENNEDY, EXPARTE TATTERSON - - - - - - - - - 688

9. ——— *Sequestration before sale by sheriff—Insolvency—No.* 1102, *ss.* 76, 77—*Supreme Court Act* 1890 (*No.* 1142), *s.* 104—*Foreign attachment—Subsequent sequestration of debtor's estate.*] The plaintiff (execution creditor) obtained a judgment against a debtor, having previously, by a writ of foreign attachment, attached all the property of the debtor in the hands of a third party. The sheriff levied upon this property, but before it was sold the estate of debtor was placed under sequestration. On interpleader summons:—*Held*, that the fact that judgment was preceded by a writ of foreign attachment did not constitute any exception to the operation of sec. 76 of the *Insolvency Act* 1890, that the plaintiff was not entitled to any charge or security upon the proceeds of the sale of such property, but that the assignee in insolvency was entitled to possession of the goods free from any charge in favour of the plaintiff for the benefit of all the creditors. THOMSON *v.* SCHAEFER - - - - - - - 404

INSTRUMENTS ACT—*Bill of sale—Act No.* 1103, *ss.* 134, 135—*Notice of intention to file bill of sale—Particulars of property described in bill of sale varying from those in notice of intention to file.*] A notice of intention to file a bill of sale described the property secured thereby as consisting of goods, chattels, etc., at present on certain premises. The bill of sale itself also included in the property secured thereby not only the goods, etc., on the premises at the time of making the bill of sale, but also property which might be afterwards acquired:—*Held*, that as there was a substantial variance between the notice and the bill of sale, the registration of the bill was bad, and a claim made under it must be barred. LYONS *v.* GRAHAM - - - 491

2. ———*Interpleader—Assignment for benefit of creditors—Bill of sale—Act No.* 1103, *s.* 132 *— Non-execution of deed of assignment by creditors — Employment of debtor to realise estate—Debtor allowed to remain in possession of property.*] By a deed of assignment, executed by a debtor in insolvent circumstances, the trustee was empowered to make payments out of the estate to all the creditors who should execute the deed. All the creditors who chose to sign were enabled to take advantage of the deed:—*Held*, that this was an assignment for the benefit of creditors within the meaning of sec. 132 of Act No. 1103. Under a deed of assignment for the benefit of creditors the trustees may be empowered to employ the debtor at a salary or fair remuneration for supervising the carrying out the trusts of

PLEADING—*Practice—Inconsistent counterclaim.*] The plaintiff sued the defendant for breach of an agreement. The defendant in his defence denied that he was a party to the agreement, and then in his counterclaim alleged that if he was a party to the agreement, which he denied, there had been a breach of such agreement by the plaintiff, and he claimed damages for such breach:—*Held*, that the counterclaim was not inconsistent, and should not be struck out as embarrassing. PENINSULAR AND ORIENTAL S.N. Co., THE, *v.* BRITNELL - - - - - 580

PRACTICE — *Affidavits* — "*Rules of the Supreme Court* 1884"—*Order XXXVIII., r.* 6—*Supreme Court Act* 1890 (*No.* 1142), *s.* 90—*Affidavits sworn in New South Wales—Commissioner for taking affidavits out of Victoria—Evidence of authority.*] An affidavit, purporting to be sworn out of Victoria before a commissioner for taking affidavits in New South Wales, cannot be read in proceedings in this Court unless there is some evidence to show that the person before whom the affidavit purports to be sworn is authorised to administer oaths in New South Wales. HOWARD *v.* JONES - - - - - - - - 578

2. —— *Appeal from Chambers*—"*Rules of Supreme Court* 1884"—*Order LIV., r.* 24—*Time.*] Notice of motion, by way of appeal from a decision of a judge in Chambers, must be made within eight days after the decision appealed against. CAHILL *v.* CAHILL - - - 65

PRACTICE—*continued.*

3. —— *Cross-examination—Evidence—Cross-examination as to credit—Oaths and Evidence Act* 1890 (*No.* 1181), *ss.* 9, 12.] The defendants were tried and convicted of conspiracy. During the trial counsel for the prisoner desired to cross-examine a witness for the prosecution as to credit by questions put to show that the witness had prepared the case for the prosecution (by the Crown), or had prepared a statement in anticipation of cross-examination. The learned presiding judge held that apart from the *Oaths and Evidence Act*, sec. 9, he would have prevented this cross-examination, but held that under the provisions of that Act he was compelled to do so:—*Held*, upon special case stated, that the refusal to allow the questions to be put in cross-examination was not justified by the *Oaths and Evidence Act* 1890, but that the learned judge had not exceeded his discretionary power in disallowing this cross-examination. R. *v.* TAYLOR AND CLARKE [497

4. —— *Final judgment*—"*Rules of Supreme Court* 1884"—*Order XII., r.* 8—*Order XIV., r.* 1—*Appearance—Application for final judgment.*] In an application under Order XIV., r. 1, for final judgment, in order to prove appearance on the part of the defendant, it is sufficient to produce the duplicate memorandum of appearance, sealed with the seal of the Court, although the fact of appearance is not alleged in the plaintiff's affidavit in support of the application. *McNamara* v. *Clarton* (17 V.L.R. 24) distinguished. DOUGHTY *v.* COUNSEL - - - - - - - 70

5. —— *Jury, trial by—Mode of trial*—"*Rules of the Supreme Court* 1884"—*Order XXXVI., rr.* 5 *and* 6.—*Application to have case tried by jury.*] The plaintiff, who was an architect, sued the defendant for his commission on a building contract. The defendant counterclaimed for negligence, involving a number of specified items of omission and defects in the contract work, improper allowances to contractor for raising the building, and damages to the building by settlement and improper foundation. The plaintiff obtained an order *exparte* for the trial of the action with a jury:—*Held*, upon an application by the defendant to set aside the order, and to have the action tried before a judge without a jury, that the action came within the terms of Order XXXVI., r. 5, and involved matters requiring a scientific and local investigation, and could not be conveniently tried with a jury. An order obtained *exparte* for the trial of an action with a jury is no bar to an application to have the action tried before a judge without a jury. ASKEW *v.* SYME - - - - - - - - 583

6. —— *Leave to proceed—Supreme Court Act* (*No.* 1142), *s.* 85—*Wilful neglect of defendant to appear—Affidavit, sufficiency of.*] In an application under sec. 85 of Act No. 1142 for liberty to proceed in an action, the affidavit in

support of such application must show circumstances and facts from which a judge may conclude that the defendant's omission to appear has been wilful, or that he is living out of the jurisdiction in order to defeat and delay his creditors. A mere statement in an affidavit that the defendant has wilfully neglected to appear to the action is not sufficient. QUINN *v.* MACARTNEY - - **42**

7. —— *Orders to review—"Supreme Court Act* 1891" (*No.* 1208), *s.* 5 (1)—*Jurisdiction of single judge to hear orders to review—Local Government Act* 1890 (*No.* 1112), *s.* 293—"*Local Government Act* 1891" (*No.* 1243), *s.* 66—*Rates—Recovery of arrears of rates—Demand of payment of rates.*] Orders to review decision of justices should be made returnable before the Full Court, inasmuch as sec. 5 (1) of Act No. 1208, giving jurisdiction to a single judge to hear orders to review, applies only to orders of courts of petty sessions. A demand was made upon the defendant by a municipal council, on the 21st March 1891, for payment of—

"Rates for year ending September 1891 - - - - 35*l.* 0*s.* 0*d.*
Arrears - - - - - 108*l.* 17*s.* 6*d.*

143*l.* 17*s.* 6*d.*"

The arrears included rates for the years 1888, 1889, and 1890:—*Held*, that as the demand was made for the payment of a bulk sum, including a rate for a year which could not be recoverable either under sec. 293 of Act No. 1112 or under sec. 66 of Act No. 1243, the demand was bad in respect of all the rates in arrear. PRESIDENT, ETC., SHIRE OF CAULFIELD *v.* EVANS - - **358**

8. —— *Originating summons—Orders LIV., r.* 24, *LVIII., r.* 15, *and LXIV., r.* 7—*Order in Chambers—Appeal—Time for appealing—Extension of time.*] The time for appealing from an order in Chambers made upon an originating summons is eight days:—*Semble*, Order LIV., r. 24, governs the time for appealing from any order in Chambers. Order LVIII., r. 15, must not be considered as affecting such appeals. Where the time for appealing has gone by, the Court will not extend the time under Order LXIV., r. 7, unless it is either furnished with special reasons or grounds for so doing, or arrives at the conclusion that it is either necessary or highly expedient in the interests of justice. FITZGERALD *v.* THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED - - - - - - - - **521**

9. —— *Parties—Objection for want of parties—Time to take objection.*] In an action by a remainderman against trustees of a will for breach of trust in handing over certain of the *corpus* of the property to the tenant for life, and improperly investing other portions of the property, the trustees, by their defence, alleged that the plaintiff had acquiesced in the breach of trust, and also raised the objection that the tenant for life was a necessary party. No steps were taken by either party as to adding the tenant for life as a party, and at the trial of the action after the evidence for the plaintiff had been given, the defendants' counsel raised the objection that she was a necessary party:—*Held*, that she was a necessary party; but:—*Held also*, that the objection was taken at the wrong time, and that the defendants ought to have taken proceedings either by summons or motion before trial to have her added as a party, and should be mulcted in costs for leaving the objection till the last moment. TIPPING *v.* RICHELIEU - **772**

10. —— *Refreshers to counsel—"Rules of the Supreme Court* 1884"—*Order LXV., r.* 27, *sub-r.* 48—*Meaning of word "day."*] A trial began on a certain day and was concluded on the next day. During the two days the trial lasted for eight hours and ten minutes:—*Held*, that the taxing officer had no discretion to allow a refresher. "Day" in rule 27, sub-r. 48, of Order LXV., means a day of the week or month, not a day of five hours. *The Courier* (1891, P., 355) dissented from. LINDO *v.* PRESSER - - - **465**

11. —— *Specially indorsed writ—Amendment of—"Rules of the Supreme Court* 1884"—*Order III., r.* 6—*Order IV., r.* 1—*Order XIV., r.* 1—*Order XIX., r.* 4—*Address of plaintiff—Signature.*] A judge has power to amend irregularities in a specially indorsed writ, where there is nothing wrong with the special indorsement itself. Where a specially indorsed writ does not set out the plaintiff's place of residence, this may be amended, as it is not part of the special indorsement, but is a mere irregularity. A specially indorsed writ containing the printed name of the plaintiff's solicitors at the foot of the claim is sufficiently signed within the meaning of Order XIX., r. 4. NOALL *v.* BILLING - - **576**

12. —— *Specially indorsed writ—Application for judgment—Amendment of indorsement after summons taken out—"Rules of the Supreme Court* 1884"—*Order III., r.* 6—*Order XIV., r.* 1.] In order to entitle a plaintiff to enter final judgment under Order XIV., r. 1, the writ of summons must be a good specially indorsed writ under Order III., r. 6, at the time when the defendant entered his appearance. In an application under Order XIV., r. 1, where the writ is not specially indorsed at the time of the defendant entering an appearance, the Court has no power to amend the writ for the purpose of enabling the plaintiff to take advantage of the provisions of Order XIV., r. 1. MOORE *v.* RUSSELL - - - - **63**

13. —— *Specially indorsed writ—Banker's account—"Rules of the Supreme Court* 1884"—*Order III., r.* 6—*Order XIV., r.* 1—*Particulars—Claim for interest.*] When an action is

brought by a banker to recover the amount of an overdrawn account with interest, the particulars should set out the time at which the account commenced, the rate at which interest was charged, and the manner in which it was calculated, whether on daily balances or otherwise, and whether with half-yearly or other rests. In such a case, where a claim is made for interest from the date of the writ till judgment, the particulars should show whether the interest is demanded by way of damages or pursuant to the contract stated in the indorsement. A writ not complying with the above requirements cannot be held to be specially indorsed. FEDERAL BANK OF AUSTRALIA *v.* BYRNE - - - - - - - - 300

14. —— *Specially indorsed writ — Demand before action—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Order XIV., rr.* 1, 2*—Application for final judgment—Service of exhibits referred to in affidavit.*] In an application for final judgment under Order XIV., r. 1, copies of the exhibits referred to in an affidavit in support of the application should be served on the defendant; but the fact of non-service of such copies is an irregularity only, and may be cured by granting an adjournment for the purpose of enabling the plaintiff to serve them. A writ containing a manifest blunder in it, but otherwise specially indorsed, does not lose its character of being specially indorsed by reason of such blunder. In an action by a customer against a bank for payment of a current account, no previous demand for payment is necessary before action, but the writ itself is a sufficient demand. TUNSTALL BRICK AND POTTERY COMPANY *v.* MERCANTILE BANK OF AUSTRALIA LIMITED 59

15. —— *Specially indorsed writ—Interest—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Order XIV., r.* 1*—Application for final judgment—Promissory note—Claim for interest—Instruments Act* 1890 (*No.* 1103)*, s.* 58.] A writ may be specially indorsed in an action on a promissory note, with a claim for interest. HUMBERSTONE *v.* MINCHIN - - - - 11

16. —— *Specially indorsed writ—Interest—"Rules of the Supreme Court* 1884"*—Order XIV., r.* 1*—Order III., r.* 6*—Claim for interest.*] A claim for interest at a certain rate on an overdrawn account cannot form the subject-matter of a specially indorsed writ, where there is no allegation that there is a contract, express or implied, to pay such interest at that rate or any other specified rate. NEW ORIENTAL BANK CORPORATION LIMITED *v.* PETT - - - - - 136

17. —— *Specially indorsed writ—Interest—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Claim for interest under guarantee—Order XIX., r.* 11*—Date of delivery on writ specially indorsed — Order XIX., r.* 4*— Signature to pleadings.*] A claim for interest under a guarantee providing for payment of "usual rate of interest" may be the subject-matter of a specially indorsed writ. A writ specially indorsed need not have the word "delivered," nor the date of delivery, at the end thereof. A specially indorsed writ may be signed in the name of a firm of solicitors. BANK OF VICTORIA *v.* PERRIN - - - 137

18. —— *Specially indorsed writ — Interest, claim for—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Order XIV., r.* 1*—Claim for interest on promissory note—Instruments Act* 1890 (*No.* 1103)*, ss.* 58, 207*—Supreme Court Act* 1890 (*No.* 1142)*, s.* 224*—Order XIX., r.* 11*—Date of delivery on writ specially indorsed.*] Upon a writ specially indorsed for the recovery of the amount of a promissory note, a claim was made for interest at the rate of 8 per cent., "pursuant to the *Instruments Act* 1890":—*Held*, that the writ was specially indorsed within the meaning of Order III., r. 6, and that the interest must be regarded as liquidated damages. A writ specially indorsed need not have the word "delivered" marked on it, nor the date of delivery at the end thereof. DANBY *v.* ASKEW - - - - - - 319

19. —— *Specially indorsed writ—Interest—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Order XIV., r.* 1.] An indorsement of a claim for interest on a writ of summons, where it purports to be a special indorsement, should show that the interest claimed is payable under an agreement or by virtue of some Statute. SANDS, MCDOUGALL & CO. *v.* NIND - - - 673

20. —— *Specially indorsed writ—Interest—"Rules of the Supreme Court* 1884"*—Order III., r.* 6*—Order XIV., r.* 1.] A writ purporting to be specially indorsed contained a claim on a promissory note, with a claim for interest in the following form, "and also for interest agreed to be paid thereon":—*Held*, that the claim for interest could not be construed as a claim for interest under the *Instruments Act* 1890, and the writ was not specially indorsed. SPEED *v.* LYONS [667

21. —— *Summons, copy signature of judge to be attached thereto—Jurisdiction—Second summons in same action—Recital of affidavits in order of judge—Irregularity—Res judicata—Abuse of the process of the Court.*] A judge is not deprived, by the fact that a previous summons has been taken out to amend the pleadings, of jurisdiction to determine the subject matter of a different summons asking for a different thing in the same action. A defendant took out a summons calling upon the plaintiff to show cause why the statement of claim should not be struck out or amended on the ground that it was embarrassing. This summons was dismissed. The defendant afterwards took out another summons to strike out the

Court a copy of probate or letters of administration granted in the United Kingdom or any of the Australasian colonies the production, verification, and deposit of the documents mentioned in sec. 40 of the *Administration and Probate Act* 1890 (No. 1060) are conditions precedent to the valid sealing of the probate or letters of administration therein referred to, but neither they nor the payment of duty under sec. 43 are conditions of the jurisdiction of the Court to grant an order *nisi* where a caveat against the application has been lodged under sec. 41. The jurisdiction of the Court is taken from the old ecclesiastical jurisdiction of the Court in England, and is conferred on it by the Act 15 Vict., No. 10, now the *Supreme Court Act* 1890 (No. 1142), secs. 20 and 21, under which caveats were one of the means by which objections to probates or letters of administration might be dealt with; and that method is recognised in Sir Redmond Barry's rules, made on the 1st February 1854, chap. 8, r. 9, and the present rules. Sec. 19 of the *Administration and Probate Act* 1890 amounts to an imperative direction to a person applying for an order *nisi* as to the materials that shall be placed before the Court in case a caveat has been lodged, but their absence, though it amounts to a grave irregularity, does not affect the Court's jurisdiction; and where their absence was not brought before the primary judge granting or dealing with the order *nisi*, and he made the order absolute, the Full Court, on appeal, where the objection as to their absence was taken, cured the irregularity by ordering that the seal of the Court be affixed to the probate upon all the formalities contained in the Act being complied with to the satisfaction of the Registrar of Probates. IN THE WILL OF BISHOP (No. 2) **793**

10. —— *Will—Execution—Attesting witness—Erasure of name of witness—Re-execution of will—Intention to revoke.*] A testator duly signed his will in the presence of Thomas Considine and Ann Murphy, who duly signed their names as attesting witnesses. Ann Murphy was a daughter of the testator, and a beneficiary under the will. A few minutes after the will had been signed Mr. Croker, the testator's medical attendant, came into the room, and pointed out that Ann Murphy's being an attesting witness would disqualify her from taking any interest under the will, and suggested that it should be re-executed. The testator thereupon acknowledged his signature, and Mr. Croker, in his presence, and presumably with his approval, erased Ann Murphy's signature, leaving nothing more of it than a few illegible marks. He then signed his own name in the presence of the testator and of Mr. Considine, but Mr. Considine did not again sign as an attesting witness:—*Held*, that there was no valid re-execution of the will, as Mr. Considine did not re-sign as attesting witness:—*Held also*, that though the erasure of the name of one attesting witness would revoke the will if it was done with an intention of revoking it, yet where it was done with no such intention there was no revocation, and the will was accordingly admitted to probate as duly executed in the presence of Thomas Considine and Ann Murphy. IN RE MURPHY **[786**

11. —— *Will—Misnomer of executor—Latent ambiguity — Evidence of testator's intention.*] Where there was no company exactly answering in name to that of a company appointed by a testator to be his executor, extrinsic evidence of the company intended by the testator was received, and probate granted accordingly. IN RE MAHER; IN RE LUDWIG - - - - - - **519**

12. —— *Will—Testamentary capacity—Onus of proof.*] The onus is on the party propounding a will of satisfying the Court of the testamentary capacity of the testator. Where no evidence is given throwing doubt upon the competency of the testator, the Court will be satisfied on proof of due execution of the will, as the presumption of sanity arises from the performance of an apparently rational act; but when the sanity of the testator is at issue, and evidence both ways has been given, the will will not be held valid merely because the Court or jury is not convinced that the testator was incompetent. IN THE WILL OF KEY - - - - - - - - - **640**

13. —— *Will and codicils—Will revoking previous wills—Subsequent codicil to prior will—Reviving of prior will.*] A testatrix having made a will dated 10th January 1890, and subsequently a codicil thereto, made another will revoking all other wills made by her. Afterwards she executed a codicil making certain dispositions of her property, and not referring to the second will in any way, but specially referring to the will of 10th January 1890, and calling it a second codicil thereto:—*Held*, that the second codicil amounted to a confirmation of the first will and a revocation of the second. IN THE WILL OF CRAWFORD **512**

14. —— *Will on several pages—Execution on first page.*] The testator filled up a printed form of will, the printed matter being contained on the first page only, and signed his name at the foot of the first page, at the place prescribed by the printed form; this execution was duly attested. The disposing part of the will on the first page ended in the middle of a sentence, and this sentence was carried on to a second page, and further testamentary dispositions made on the third and fourth pages. There was no signature except upon the first page. Evidence was given by affidavit as to the history of the actual making and writing of the will, showing clearly that the testator treated the whole document as his will before signing:—*Held*, that probate should be granted to the whole document. *In the Will of White* (12 V.L.R. 293) followed. IN RE MAHONY **[482**

2. —— *Construction of — Annuity — Setting apart fund to provide annuity—Insufficiency of fund—Annuity payable out of corpus.*] Where a testator directs a sufficient sum to be set apart in order to produce an annuity of a specific amount, which on the death of the annuitant is to fall into the residuary estate, the annuitant will be entitled to be paid out of the corpus of the fund set apart if he does not leave sufficient assets to produce income sufficient to meet the annuity; but where the fund set apart to provide the annuity is given, on the death of the annuitant, over, and does not fall into the residue, the annuitant is entitled only to the income that that fund produces. TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED *v.* DIMOCK - 729

3. ——*Construction—Gift to individuals or a class.*] A testator devised his residuary estate to trustees upon trust to divide the same equally between A and B, his brothers; C, his sister; and the children of A by his first wife; so that each of his brothers, his sister, and the children of A should take an equal share of the residuary estate. A died in the testator's lifetime:—*Held*, that this was a gift to a class, and not to individuals, and that there was no intestacy as to A's share, but that it was divisible among the other residuary legatees. *In re Chaplin's Trusts* (33 L.J. Ch. 183) dissented from. TRUSTEES EXECUTORS AND AGENCY COMPANY *v.* MCDONALD - - 572

4. —— *Construction of—Trusts of will—Legal estate—Order XXV., r.* 5. Where the contest on the construction of a will was as to who was entitled to the legal estate, and there were no trusts to be declared, the Court of Chancery before the *Judicature Act* left the parties to their remedy in an action of ejectment or trespass, and this is not altered by the *Judicature Act*, or by Order XXV., r. 5; nor is the matter different where the person entitled to the legal estate is also entitled to the beneficial interest. GEMMELL *v.* GEMMELL - - - - - 382

5. —— *Construction of—Wills Act* 1890 (*No.* 1159), *s.* 24—*Devise of land—Devise of real estate in a particular place—Leasehold estate in such place.*] A testator having freehold land and leasehold land at Coburg devised all his "real estate at Coburg":—*Held*, that, there being no contrary intention on the face of the will, such devise carried the leasehold land as well as the freehold. HESTER *v.* THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED - - 509

6. —— *Executors—Direction to sell and convert within twelve months—Postponement of sale by Court.*] A testator by his will directed his executors to sell and convert into money his real, and such part of his personal, estate as should not consist of money, within a period of twelve months after his decease, and invest the proceeds as therein mentioned, and pay the income to his wife for life, and on her death to his children (several of whom were infants) until the youngest should attain twenty-one, and then to divide the principal among them. The executors renounced probate, and administration *c.t.a.* was granted to the plaintiff company. The debts, funeral, and testamentary expenses had been paid, and the principal part of the property unsold consisted of a large number of shares in a limited liability company. The plaintiff company, just within twelve months of the testator's death, brought an action, alleging that the company in which these shares were was a substantial and solvent one, with good prospects, and paying dividends; that the market for the shares was, and had been since the testator's death, very bad, but that it was not likely to become lower, and that there was a good prospect of their being able to sell the shares at a good price within one or two years, and the defendants had requested the plaintiff to postpone selling the shares. The adult beneficiaries admitted these allegations, the infants putting in the usual defence, and the Court made an order allowing eighteen months within which to sell at a fixed price, without prejudice to an application by any of the parties for a further postponement. NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED *v.* JOHNSON [386

7. *Testamentary capacity—Undue influence—Beneficiary preparing will—Onus of proof—Degree of soundness of mind.*] The fact that a person who prepared a will, under which he takes a benefit, was not seeking to benefit himself personally so much as his Church, does not relieve him from the obligation cast upon him on propounding the will of satisfying the Court that no undue influence was used to procure the will. The highest degree of soundness of mind is required in order to constitute capacity to make a testamentary disposition of property, inasmuch as a testator must be able to reflect upon the claims of the several persons who by nature or through other circumstances may be supposed to have claims on his bounty, and of properly considering them, and to determine in what proportions his property shall be divided amongst the claimants. IN RE WALSH - - - 739

8. —— *Testamentary capacity—Undue influence and mental imbecility—Onus of proof.*] Where a will was prepared by a solicitor and his clerk for a man who at the time of giving instructions and at the time of executing it appeared to them perfectly competent to make a will, and on whose evidence in support of the will if standing alone the Court would undoubtedly have acted, but who, other evidence showed, had from long continuous drinking become partly imbecile, and who had been influenced in the making of the will by the executor and sole beneficiary and his wife, the judge refused to admit the